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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RITA M. LAVELLE,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an attorney employed by a federal agency as an attorney, who provides legal counsel to a high agency official in connection with agency business, has an obligation to advise said official to seek independent counsel when it becomes apparent that the agency attorney may become a witness against the agency official in a criminal proceeding related to the advice given to the agency official, and whether the failure of the agency attorney to provide such advice, and the subsequent testimony by the attorney against the agency official in a criminal proceeding, and the refusal of the trial court herein to allow cross-examination of the attorney for bias, constitutes a denial of due process and a violation of the agency official's Sixth Amendment rights.

2. Whether the introduction of inflammatory similar acts evidence which was not relevant to two of five counts of the charge without first requiring the prosecution (out of the presence of the jury) to demonstrate the relevance of its evidence by (1) showing by clear and convincing evidence that the alleged offenses were committed, and (2) allowing argument on the probative value of the evidence to an issue other than the character of the accused, was prejudicial to petitioner and a denial of due process.

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OPINION AND FINDINGS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-26a) is not yet reported. The Judgment and Probation/Commitment Order of the district court appears in App. B, *infra*, 27a-29a.

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*, 30a-31a) was entered on January 18, 1985. A petition for rehearing and suggestion for rehearing *en banc* were denied on February 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Pertinent text is set forth in Appendix D, *infra*, 34a-39a)

U.S. Constitution, Amendment V

U.S. Constitution, Amendment VI

18 U.S.C. § 1001—Statements or entries generally

18 U.S.C. § 1505—Obstruction of proceedings before departments, agencies and committees

18 U.S.C. § 1621—Perjury generally

Fed. Rules Evid. Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Fed. Rule Evid. Rule 404—Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

Disciplinary Rules, Code of Professional Responsibility, District of Columbia Bar

DR 7-102—Representing a Client Within the Bounds of the Law

DR 7-104—Communicating with One of Adverse Interest

STATEMENT OF THE CASE

Factual Background

In 1982, appellant Rita M. Lavelle was nominated by President Reagan to become Assistant Administrator for the Office of Solid Waste and Emergency Response of the U.S. Environmental Protection Agency ("EPA"). Jt. App.[1] 875. At her confirmation hearings before the Committee on Environment and Public Works of the United

[1] "Jt. App." refers to the Joint Appendix filed in the court of appeals.

States Senate ("Senate Environment Committee"), in March 1982, Ms. Lavelle promised to recuse herself from any matters involving her former employer, Aerojet General Corporation ("Aerojet"). Jt. App. 973-74. Ms. Lavelle also executed a "general" recusal memorandum from all matters involving her former employer. Jt. App. 616, 973-74.

During her Senate confirmation hearings, Ms. Lavelle was questioned regarding the Stringfellow Acid Pits, a waste disposal site in California ("Stringfellow"). Jt. App. 807-08. There was considerable congressional interest in cleaning up this site. *Id.* Ms. Lavelle advised the Senate Environment Committee that she would give early attention to the Stringfellow site. *Id.* Shortly after her confirmation, Ms. Lavelle requested that her staff prepare for her a status briefing on the Stringfellow site. Jt. App. 808. An in-depth briefing was given to her on May 28, 1982, eight weeks after her confirmation. Jt. App. 808-09. During the briefing, Ms. Lavelle indicated her displeasure that more vigorous action was not being taken to identify the responsible parties and initiate enforcement. Jt. App. 810-11. One of her staff attorneys pointed out to Ms. Lavelle that her former employer, Aerojet, was on a list of "possible responsible parties" and suggested that she should remove herself from discussions involving Stringfellow. Jt. App. 811. Ms. Lavelle questioned the validity of the list, asked that it be verified, and indicated that she wanted additional information before she recused herself from Stringfellow matters. Jt. App. 811-15.

On May 31, 1982, Ms. Lavelle telephoned Aerojet's General Counsel to inquire whether Aerojet had in fact disposed at Stringfellow. She was told that Aerojet had not disposed at the site and did not expect to be a "responsible party" under the Superfund law. Jt. App. 705-08.

Ms. Lavelle proceeded to participate in efforts to issue EPA "notice letters" to "potential responsible parties" in

connection with Stringfellow. Jt. App. 500. She made no effort to prevent Aerojet from receiving a "notice letter" or being cited as a "responsible party." Jt. App. 439. On June 18, 1982, however, on the advice of EPA Counsel, Ms. Lavelle executed a "site specific" recusal memorandum and permanently removed herself from any activity in connection with Stringfellow. Thereafter Ms. Lavelle did not participate in Stringfellow matters. Jt. App. 454, 517.

Some six months later, EPA was in the process of responding urgently to a subpoena issued by the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the U.S. House of Representatives. Jt. App. 579. In preparing a response thereto, EPA's Office of the General Counsel discovered a memorandum and transmittal slip, dated June 14 and June 15, 1982, respectively, and evidencing Superfund participation by Ms. Lavelle in Stringfellow on those dates. Jt. App. 589.

On Monday evening, December 13, 1982, at EPA, Ms. Lavelle was asked whether her June 14-15, 1982 Stringfellow activity comprised a violation of her recusal from matters involving her former employer. Jt. App. 931. Ms. Lavelle responded that she had executed a "site specific" recusal memorandum *after* the June 14-15 memoranda, and that she did not participate in Stringfellow after her "site specific" recusal. Jt. App. 641, 932. She was requested to execute a sworn statement to that effect. Jt. App. 642, 648, 933.

That same evening (on December 13, 1982), Mr. Yamada, the EPA Deputy General Counsel, recovered a copy of Ms. Lavelle's "site specific" recusal memorandum, dated June 18th, indicating that she had indeed executed the "site specific" recusal letter after the June 14-15 documents. Jt. App. 678. Mr. Yamada took the copy of the site specific recusal to Mr. Perry, the EPA General Counsel. Jt. App. 678. Mr. Yamada advised Mr. Perry that Ms. Lavelle had stated the correct facts—the June 14-15

documents had been originated prior to her site specific recusal on June 18. *Id.* Ms. Lavelle had previously made consistent statements to the EPA Administrator, Ms. Burford (Jt. App. 653) and Ms. Burford's Chief of Staff, Mr. Daniel (Jt. App. 641), when answering Ms. Burford's question regarding Ms. Lavelle's alleged participation in Stringfellow matters after she recused herself. Jt. App. 933-37. Ms. Lavelle was thereafter requested to sign a statement which attested to this sequence of events. A statement was drafted initially by the EPA Deputy General Counsel. Jt. App. 691. In the statement, Ms. Lavelle stated that she first learned on June 17, 1982 that Aerojet was "cited" as a responsible party at Stringfellow, that she promptly recused herself, and that she signed the Stringfellow recusal letter on June 18th. Jt. App. 946. The December 13, 1982 Statement of Certification was forwarded to the House of Representatives Subcommittee by the EPA General Counsel, Robert M. Perry, on the same evening it was executed by Ms. Lavelle. Jt. App. 697.

Mr. Perry and his deputy Mr. Yamada, knew that the December 13, 1982 Statement of Certification could be read to be technically incorrect, because—after Ms. Lavelle had left his office—Mr. Perry asked Mr. Yamada to telephone Mr. Edward Kurent, the EPA staff attorney who was present at the May 28th Stringfellow briefing. Jt. App. 694-97. Mr. Yamada telephoned Mr. Kurent and asked when was the first time Ms. Lavelle knew of Aerojet involvement at Stringfellow. *Id.* Mr. Kurrent told Mr. Yamada he believed Ms. Lavelle knew as early as late May. Jt. App. 695. Mr. Yamada hung up the phone and ". . . told Bob Perry that there was an inconsistency between what Ed Kurent said and what Rita Lavelle had stated in her Statement of Certification." Jt. App. 695. Ms. Lavelle had stated the first time she learned that Aerojet was "cited" as a responsible party was June 17th, and Mr. Kurent said he told her Aerojet might be involved as early as early as late May. Jt. App. 695.

Messrs. Perry and Yamada did not inform Ms. Lavelle of the inconsistency which could be read into the statement and which they had confirmed immediately after Ms. Lavelle departed nor did they inform her of her right to obtain counsel. Jt. App. 696. However, EPA's General Counsel forwarded the statement to Congress the same evening. Jt. App. 697.

On February 4, 1983, Ms. Lavelle was instructed to resign by EPA Administrator Burford. Jt. App. 951. On February 23, 1983, Ms. Lavelle appeared before the United States Senate Committee on Environment and Public Works. Jt. App. 961, 966. During the course of that hearing, Ms. Lavelle was handed a copy of a February 8, 1983 letter to the Department of Justice [2] with attached copies of the June 14th memorandum and June 15th transmittal slip. She was asked whether these memoranda were not an indication of a clear violation of the pledge to recuse herself. Ms. Lavelle replied that the documents in question were dated June 14 and June 15 and that she had recused herself on June 18, and that therefore, the documents indicated activities undertaken prior to her recusal from Stringfellow matters. Jt. App. 968-69.

On August 4, 1983, Ms. Lavelle was indicted on five counts. Jt. App. 12-30.

The jury convicted Ms. Lavelle of the following four offenses:

Count 1: making a false statement to EPA in violation of 18 U.S.C. § 1001 (the December 13, 1982 Statement of Certification).

Count 2: endeavoring to obstruct a proceeding of the Subcommittee on Oversight and Investigations of the Committee on En-

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[2] On August 22, 1984, Congressman Peter W. Rodino, Jr., Chairman, Judiciary Committee, U.S. House of Representatives, wrote to the Attorney General of the United States suggesting that Ms. Lavelle was investigated in order to prevent or delay the Congress from obtaining access to certain documents and witnesses.

ergy and Commerce of the U.S. House of Representatives, in violation of 18 U.S.C. § 1505 ("causing" the December 13, 1982 Statement of Certification to be forwarded to Congress).

Count 3: perjury before the United States Senate Committee on Environment and Public Works in violation of 18 U.S.C. § 1621 (Ms. Lavelle gave substantially the same facts contained in the December 13, 1982 Statement of Certification).

Count 4: perjury before the Subcommittee on Investigation and Oversight of the Committee on Public Works and Transportation of the U.S. House of Representatives, in violation of 18 U.S.C. § 1621 (Ms. Lavelle gave substantially the same facts contained in the December 13, 1982 Statement of Certification).

All four counts arose from the same material facts—when Ms. Lavelle first learned that Aerojet was cited as a responsible party at Stringfellow, as set forth in her December 13, 1982 Statement of Certification.

All four counts involve the element of intent—whether the material facts concerning her knowledge of Aerojet involvement at Stringfellow, as stated by Ms. Lavelle, were incorrect or false, and whether she knew them to be false and stated them with specific intent to deceive.

Counts ONE and TWO involve Ms. Lavelle's intent on December 13, 1982—whether she knew the material facts to be false and stated them with intent to deceive at the time she signed the Statement of Certification.

Counts THREE and FOUR involve Ms. Lavelle's intent on February 23 and 24, 1983—whether she knew the material facts to be false and stated them with intent to deceive at the time she testified before the congressional committees.

On January 9, 1984, Ms. Lavelle was sentenced to six months' imprisonment and a $10,000.00 fine. Jt. App. 240. In its opinion dated January 18, 1985, the court of appeals affirmed the judgment of the trial court. Appendix A hereto.

Stage in the Proceedings Where Questions Sought to Be Reviewed Were Raised

1. On August 22, 1983, Ms. Lavelle filed a motion to dismiss the indictment on the ground that improprieties in the conduct of the grand jury proceedings violated her rights pursuant to the Fifth Amendment, and a motion to suppress testimony given by EPA attorneys on the ground that such testimony was and would be given in violation of the attorney-client privilege. Jt. App. 3. Ms. Lavelle also requested certain discovery and an evidentiary hearing on the motion to dismiss. Jt. App. 31-41.

The question concerning the responsibility of a federal agency lawyer to an agency official was raised in these pretrial motions. Jt. App. 31-47. Counsel for Ms. Lavelle argued that an attorney-client relationship arose when agency attorneys advised Ms. Lavelle as an agency official concerning matters related to her conduct of agency business; that the matters set forth in the first four counts of the indictment were the subject of confidential consultation between Ms. Lavelle and the EPA attorneys who advised her; and that the subject matter of each count for which Ms. Lavelle stands convicted concerns the conduct of her official duties at EPA. *Id.*

On October 13, 1983, the trial court denied the motion to dismiss and the request for discovery, without holding an evidentiary hearing. Jt. App. 191-97. On October 24, 1983, the trial court denied the motion to suppress testimony. Jt. App. 289-360.

During trial, the court refused to permit cross-examination of the prosecution's EPA attorney-witnesses con-

cerning misconduct by EPA attorneys in connection with the December 13, 1982 Statement of Certification. Jt. App. 636. The court summarily cut off appellant's attempts to demonstrate the bias of the prosecution's chief attorney witnesses (bias against appellant and in favor of covering up or avoiding the subject of their own misconduct and violations of the Code of Professional Responsibility in connection with their conduct toward Ms. Lavelle). Jt. App. 634-36. Furthermore, the court sustained the prosecution's objections to evidence offered as probative of Ms. Lavelle's state of mind prior to her hearings in the Senate and House. Jt. App. 959-60.

These issues were presented to the court of appeals as follows:

> 1. The trial court erred in refusing to permit cross-examination concerning EPA attorney misconduct and the standards of attorney conduct made applicable by the Code of Professional Responsibility, in connection with the advice given to Ms. Lavelle by EPA attorneys. The trial court thereby prevented cross-examination of crucial prosecution witnesses designed to demonstrate bias against Ms. Lavelle and in favor of their own exoneration.

Br.[3] at 38.

> 3. Ms. Lavelle's E.P.A. attorneys, in violation of the Code of Professional Responsibility, revealed privileged attorney-client confidences to the prosecution and actively participated in the investigation of Ms. Lavelle in order to avoid criminal liability for themselves, labored under a conflict of interest, and the prosecutor's knowing reliance upon and active utilization of such unethical participation by Ms. Lavelle's EPA attorneys in the bringing of the Indictment against Ms. Lavelle comprised such a totality of grand jury abuse that Ms. Lavelle's Fifth Amendment rights were violated in that she was denied a fair and unbiased grand jury. In addition,

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[3] "Br." refers to appellant's brief to the court of appeals.

> the trial court erred in denying Ms. Lavelle's Motion to Dismiss the Indictment and refusing to permit discovery or hold an evidentiary hearing thereon.

Br. at 62. The court of appeals rejected Ms. Lavelle's argument because of "logical inconsistencies of her theory of bias" and because "the defense had ample opportunity to present to the jury the facts upon which the propriety or impropriety of the EPA attorneys' role in the preparation of the Statement of Certification could be assessed." App. hereto at 12a.

2. On August 22, 1983, Ms. Lavelle also filed a motion for separate trials for Counts One and Two, Counts Three and Four, Count Five on the grounds that the alleged offenses were misjoined and that Ms. Lavelle would be substantially prejudiced by joint trial of all offenses. Jt. App. 3. This motion was denied on October 24, 1983. Jt. App. 193-94.

The issue of similar acts evidence was raised during argument before the trial court on November 18, 1983. Jt. App. 557-59. Counsel for Mrs. Lavelle argued that the court, as a predicate to the determination that such evidence was relevant, should require the government to offer proof demonstrating that the defendant committed the offense, and if the proof was insufficient that the court exclude the evidence. Counsel argued further that the prosecution's proposed similar acts evidence was relevant only to Ms. Lavelle's character and therefore had no relevance to her intent to commit the specific acts for which she was charged. Jt. App. 558-59.

During trial the court admitted, over defendant's objection, the prosecution's evidence of certain "similar acts" which were not relevant to Counts One and Two without first evaluating the evidence out of the presence of the jury and then permitting argument concerning the admissibility of such evidence. Jt. App. 556-65.

Evidence was admitted concerning two alleged prior similar acts, both of which occurred during Ms. Lavelle's

Congressional testimony on February 23 and 24, 1983. The first instance involved the truthfulness of Ms. Lavelle's February 1983 Senate committee testimony regarding her recollections of discussions at an April 8, 1982 meeting between Ms. Lavelle and New York State environmental officials.

The second alleged similar act involved the truthfulness of Ms. Lavelle's February 1983 testimony before the Senate committee and the House Oversight Subcommittee. The prosecution showed videotapes of Ms. Lavelle testifying to both committees that she had voluntarily turned over her 1982 appointment calendars to the committees and that she had not been given access to her records for the purposes of preparing for the testimony.

The prosecution also introduced testimony of two former special assistants to Ms. Lavelle (Ms. Baldyga and Ms. Janiszewski) who testified that at the direction of Ms. Lavelle's Chief of Staff on the night that she was asked to resign from EPA, they removed materials from Ms. Lavelle's office and put them in the trunk of Ms. Baldyga's car. Ms. Baldyga testified that subsequently she transferred these documents from the trunk of her car to the car of Mr. Ingold, Ms. Lavelle's former Director of Public Affairs. Ms. Baldyga testified that this document transfer occurred in Ms. Lavelle's presence in the middle of the night in the parking lot of a restaurant in northern Virginia, and that some of these documents were later seen at Ms. Lavelle's apartment.

In the court of appeals, Ms. Lavelle raised the issue of admission of similar acts evidence without first requiring the prosecution, out of the presence of the jury, to demonstrate the relevance of the evidence to an issue other than the character of the accused. Br. at 52-61. Ms. Lavelle also raised the issue of admission of such evidence where its inflammatory effect on the jury substantially outweighed its probative value to the question of Ms. Lavelle's intent to do the acts charged in the indictment. *Id.* The court of appeals concluded that "[e]vi-

dence of Ms. Lavelle's false testimony in other instances was . . . relevant to her specific intent to deceive and not merely evidence of Ms. Lavelle's general bad character." App. A, *infra*, 18a. The court of appeals concluded further that "the record clearly reveals that the probative value of the evidence clearly outweighed its minimal prejudicial impact." App. A, *infra*, 26a.

REASONS FOR GRANTING THE PETITION

When an Agency Attorney Advises an Agency Official with Respect to Agency Matters, Subsequently Testifies Against the Official in a Criminal Proceeding Involving the Same Matters, and Cross-Examination of the Agency Attorney on Matters Involving Attorney Misconduct and Violation of the Code of Professional Responsibility Is Restricted by the Trial Court, the Official Is Denied the Opportunity to Confront These Witnesses and Is Denied Due Process

This case presents an issue of significant importance which has not previously been addressed by this Court and which has a direct bearing on the thousands of lawyers who hold appointments to civilian attorney positions in the executive agencies of the federal government. This issue is the extent to which the Constitutional rights of a high agency official are violated when an agency attorney acts as an advisor to the official in agency matters and subsequently as a witness against the official in criminal proceedings involving the same agency matters. Furthermore, in a criminal case, a trial court's limitation of the defendant's cross-examination of crucial prosecution witnesses acquires a constitutional dimension.

Cross-examination of a witness is a matter of right, and a purpose, among others, is "that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased." *Alford v. United States*, 282 U.S. 687, 691-92 (1931). The right of cross-examination is the primary interest secured by the Sixth Amendment's guarantee that the ac-

cused in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). This Court has stated that "although opportunity to cross-examine is a fundamental right demanding great respect . . . the courts have also recognized that regulation of the extent and scope of cross-examination must generally lie within the discretion of the trial court and reversal is warranted only where an abuse of discretion leads to prejudice." *Howard v. United States*, 128 U.S. App. D.C. 336, 341, 389 F.2d 287, 292 (1967). *See United States v. Slade*, 200 U.S. App. D.C. 240, 256, 627 F.2d 293, 309 (1980), *cert. denied*, 449 U.S. 1034 (1980). The question presented here, therefore, is whether the cross-examination of EPA attorneys accorded to defense counsel at trial was sufficient to satisfy Sixth Amendment standards as annunciated in *Davis v. Alaska, supra*. *See United States v. Summers*, 598 F.2d 450 (5th Cir. 1979).

The importance of full cross-examination to disclose possible bias is necessarily increased when it involves the "star" prosecution witness—one providing an essential link in the prosecution's case. *United States v. Barrentine*, 591 F.2d 1069, 1081 (5th Cir. 1979). In *Davis v. Alaska, supra*, the Court reversed the petitioner's conviction and rejected the conclusion reached by the Supreme Court of Alaska that the cross-examination permitted defense counsel was adequate to develop the issue of bias, stating as follows:

> While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. . . . [D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

415 U.S. at 318 (emphasis in original).

At trial herein, the prosecution conducted extensive direct examination of EPA attorneys on matters relating to Ms. Lavelle's conduct and their actions as attorneys in connection therewith. Indeed, these EPA attorneys were "star" witnesses for the prosecution and provided the essential links to the prosecution's case. *Compare United States v. Barrentine, supra.* Since the prosecution deemed it important enough to ask these EPA attorneys about their conduct as attorneys in response to Ms. Lavelle's Stringfellow recusal, it did not become irrelevant and immaterial when Ms. Lavelle's counsel chose to cross-examine concerning this same attorney conduct. *See United States v. Pugh,* 141 U.S. App. D.C. 68, 72, 436 F.2d 222, 224 (1970). Ms. Lavelle's cross-examination was designed to impeach and show bias. The trial court cut off cross-examination at the exact point where Ms. Lavelle's counsel was prepared to drive home to the jury the very heart of the cross-examination. Because cross-examination was restricted, we cannot know whether the EPA attorneys who appeared for the prosecution were aware that they may have committed specific violations of the Code of Professional Responsibility or Federal criminal law. Ms. Lavelle was at least entitled to develop the possibility that the testimony of certain EPA attorneys may have been motivated by a desire to avoid prosecution and to cover up or obscure violations of professional ethics. The trial court's limitations on cross-examination comprised an abuse of discretion and prejudiced the defense. This limitation of cross-examination denied Ms. Lavelle her right to confront key witnesses in violation of her Sixth Amendment rights. The limitations on the cross-examination were sufficiently disconcerting and substantively improper to warrant reversal on constitutional grounds. *Compare United States v. Slade, supra,* 627 F.2d at 309; *United States v. Pugh, supra,* 141 U.S. App. D.C. at 72, 436 F.2d at 226; *Howard v. United States, supra,* 128 U.S. App. D.C. at 341, 389 F.2d at 292; *see United States v. Summers, supra.*

The EPA lawyers knew Ms. Lavelle's sworn statement was incorrect. They did not tell her. They did not suggest she get her own lawyer. Instead, they obtained her signature and promptly sent the "Statement of Certification" to Congress. It was error for the trial court to deny Ms. Lavelle the opportunity to develop her defense by utilizing the CPR on cross-examination and giving her own evidence of attorney misconduct during her direct testimony.

Since intent is a state of mind, it cannot ordinarily be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind. A jury must infer the defendant's intent from the surrounding circumstances. The trial record is clear that on December 13, 1983, when Ms. Lavelle was confronted with the allegations that she had continued to act on Stringfellow matters after she had recused herself, she was surprised, confused, and that she acted in haste. She was angry and incredulous that Mr. Perry would be raising this issue at that time. App. 836, 842, 857, 928-48. Because of her state of mind, she could well have been careless or negligent in checking the facts. As a non-lawyer confronted by powerful agency attorneys, she was not informed of the import of her actions or the veracity of her recollection. It was essential that the jury have all the evidence which was available concerning the surrounding circumstances to assist them in determining Ms. Lavelle's state of mind and intent at the time she signed the incorrect statement.

Mr. Perry and Mr. Yamada had information which would indicate that Ms. Lavelle had misstated the facts; they knew of her state of surprise and confusion; and they failed to advise her of her potential error. This is certainly relevant to the surrounding circumstances at the time Ms. Lavelle signed the "Statement of Certification." If Ms. Lavelle had been alerted to the discrepancy, she could have checked the facts more closely and corrected the mistake. Given the evidence that Messrs.

Perry, Brown and Yamada, as lawyers, had an ethical obligation to so advise Ms. Lavelle, and given the fact that they did not so advise her, the jury could have determined that these lawyers had duped Ms. Lavelle into signing an incorrect statement. Such information was essential for the jury in order to evaluate Ms. Lavelle's state of mind and to determine whether she knew the statement was incorrect when she signed it. It was also essential for the jury in order to evaluate fully the credibility and potential bias of crucial prosecution witnesses. No other evidence was admitted to show the ethical obligation of these lawyers under the Code of Professional Responsibility. Nor was any evidence admitted to show that these lawyers, by causing a false statement to be submitted to Congress, could have been guilty themselves of the very charge of which Ms. Lavelle was accused. This evidence was vital to Ms. Lavelle's ability to argue to the jury that these same EPA attorneys who advised her were biased against her and had a personal and pecuniary interest in covering up their own potentially unethical or illegal conduct.

Federal Government lawyers are subject to a Code of Professional Responsibility in the jurisdiction in which they are admitted to practice. In addition, their agency or department may make their professional conduct subject to such a code by administrative direction or regulation.

The federally-employed lawyer may be the lawyer who is a principal legal officer of a department, agency or other legal entity of the government, or a member of the legal staff of the department, agency or entity. Important issues result from such a situation and involve the attorney-client relationship between these federally employed lawyers and the senior officials in the agencies which they represent.

The threshold question involves the circumstances in which and the extent to which an attorney-client rela-

tionship exists between lawyers employed by a federal agency and the officials charged with the administration of the agency. A subsidiary issue involves the responsibilities which such a relationship entails with respect to testimony by these lawyers in a criminal proceeding against an agency official with respect to activities within the scope of the agency official's employment and with respect to which the agency official has received advice from the agency lawyer.

The attorney-client privilege has been asserted frequently by federal agencies in connection with requests for production of documents in civil suits. *See e.g. Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242 (D.C. Cir. 1977). But the very important question of a federal government lawyer's duties and responsibilities to an official of the agency he represents in connection with criminal proceedings involving the agency official have not been addressed by this Court.

The facts in this case present a high agency official who was advised frequently by agency attorneys on matters concerning agency business, and who was subsequently the subject of criminal proceedings involving those same matters, as a result of the testimony of the lawyers who advised her.

The trial court in this case denied Ms. Lavelle's motion to suppress the testimony of her EPA lawyers and to suppress the Statement of Certification (in connection with the signing of which she had received advice from these EPA attorneys). In denying Ms. Lavelle's motion to suppress, the trial court determined there was no attorney-client privilege existing between Ms. Lavelle and her EPA attorneys. Jt. App. 356.

Although the courts have yet to articulate a test that effectively determines the scope of the attorney-client privilege in federal agencies, several useful tests have been developed to delineate the dimensions of the attorney-

client privilege in the corporate context. But cases which the courts have considered concerning the privilege both in the corporate and government context have largely been concerned with protection of the entity, *i.e.*, the corporation or the agency, from discovery requests in civil cases rather than protection of the individual employee from disclosure of confidences in a criminal proceeding. *See e.g., Niemer v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977), *rev'g* 420 F. Supp. 794 (N.D. Ill. 1976); *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980); *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Nevertheless, because of the structural similarities between corporate and government entities, review of judicial decisions in the corporate situation is useful. *Upjohn* is the most recent definitive case on the deliniation of the corporate attorney-client privilege. In his concurring opinion, Chief Justice Burger described the attorney-client relationship as follows:

> . . . as a general rule, a communication is privileged at least when an employee or former employee speaks with an attorney at the direction of management regarding conduct or proposed conduct within the scope of employment, provided the attorney is one authorized by the management to inquire into the subject and is seeking information to assist counsel in evaluating whether the employee's conduct has bound or would bind the corporation, assessing the legal consequences, if any, of that conduct, or formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

445 U.S. at 941. In addition, Chief Justice Burger commented that communications other than those expressly held protected between employees and corporate counsel may indeed be privileged. *Id.*

While *Upjohn* addressed the attorney-client relationship in the corporate environment, other authorities have addressed the relationship as it applies in the federal service. Opinion 73-1 of the Committee of Professional Ethics of the Federal Bar Association deals with the identity of the federal government lawyer's "client." 32 *Federal Bar Journal* 71 (1973). In considering the usual situation of a federally-employed lawyer who is a principal legal officer of a department, agency or other legal entity of government, or a member of the legal staff of the department, agency or entity the opinion states:

> . . . [T]he client of the federally-employed lawyer, using the term in the sense of where lies his immediate professional obligation and responsibility, is the agency where he is employed, *including those charged with its administration insofar as they are engaged in the conduct of the public business.* The relationship is a confidential one, an attribute of the lawyer's profession which accompanies him in his government service . . . .

32 *Federal Bar Journal* at 72 (1973) (emphasis added). Thus, the federally-employed lawyer has a professional obligation and responsibility to both the agency and the senior agency officials insofar as the agency officials are engaged in agency business. A significant issue arises when the activities of the agency official in the conduct of agency business become the subject of investigation for alleged wrongdoing. Having previously established a *de facto* attorney-client relationship with the agency official through continual discussion, comment and advice, the lawyer is faced with the obvious conflict of investigating someone with whom he has established a confidential relationship. At some point the lawyer must certainly advise the agency official that the lawyer is representing the agency exclusively in investigating the official's activities. Only from that point forward is it clear that no attorney-client relationship exists between the agency lawyer and the agency official.

Prior to such advice being given, communications between the lawyer and the official must be privileged, particularly if such communications can be used in a criminal proceeding against the agency official. Under such circumstances, the attorney cannot be ethically free to testify against the official in a criminal proceeding.

As a result of an attorney-client relationship, a presumption arises that confidential communications have been exchanged. *Arkansas v. Dean Ford Products Co.*, 605 F.2d 380 (8th Cir. 1979); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). Under Canon 4 of the ABA Code of Professional Responsibility, "the attorney-client relationship raises an irrefutable presumption that confidences were disclosed." *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

Because of the presumption that confidential communications have been exchanged as the result of an attorney-client relationship, a strict prophylactic rule should be applied to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may be used subsequently—to the client's disadvantage. *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973).

The application of these principles in the context of a governmental entity was examined in ABA *Informal Opinion 1282*, November 21, 1973. This opinion examined the situation of a city corporation counsel in a case in which the interests of the city and of the municipal police officers were in conflict with regard to a suit against the city in which police officers were charged with using excessive force. The Committee held that the corporation counsel's office could not represent the city entity, inasmuch as certain attorneys were in possession of the officers' confidential information and DR 5-105(D) served to disqualify the entire office of the corporation counsel.

In pretrial argument on Ms. Lavelle's motion to dismiss the indictment, her counsel argued that the December 13, 1982 Statement of Certification was drafted by the same EPA attorneys who were advising Ms. Lavelle on her recusal; that the statement was sent to Congress by these same EPA attorneys; and that "it wasn't until January 3, 1983 that [EPA General Counsel] Mr. Perry did what is proper for a government attorney to do when explaining the attorney-client relationship to a nonlawyer member of the administration . . . . He advised the defendant that . . . [she] could hire her own personal counsel . . . ." Jt. App. 254-55.

It was further argued that EPA attorneys were themselves the subject of criminal investigations by the prosecution, and that they had a divided loyalty and labored under a conflict of interest. Jt. App. 255-63. The trial court responded as follows: "Well, let's just say this: I don't think indictments depend at all upon one's profession or one's status. So, *that she is a nonlawyer is immaterial*" (emphasis supplied). Jt. App. 263-64. Counsel for Ms. Lavelle pointed out that ". . . each government attorney is subject to the Code of Professional Responsibility. . . ." Counsel also discussed applicable ethical provisions, including the Code of Professional Responsibility ("CPR") and other authorities, and stated:

> Your Honor, the gist of what we're saying is that when there is a possibility of personal, individual exposure on an individual basis, it is the duty of the federal government attorney to advise the defendant, "Listen, you're getting into an area where you're going to need an attorney. I'm the attorney for the government. I'm not giving you any advice on a personal level, nothing to you as an individual. You have to get your own private attorney for that.
>
> That was never done. The defendant is a nonlawyer. She's under no duty to know that that is what's supposed to happen. And the defendant's affidavit read as a whole shows that she relied on these attorneys for matters not only in her official capacity

> but as an individual and her problems in an individual capacity, and she was never told until January of '83 that she should hire her own lawyer for these individual problems.

Jt. App. 268.69. The motion to dismiss the indictment was denied on October 13, 1983. Jt. App. 191-92.

This issue was argued again before the trial court during the October 24, 1983 oral argument on Ms. Lavelle's motion to suppress testimony of EPA attorneys. Jt. App. 289-360. Ms. Lavelle's counsel argued that EPA's General Counsel and his staff of attorneys had an ethical duty to advise Ms. Lavelle to engage personal counsel when their attorney-client relationship with Ms. Lavelle was in conflict with their duty to EPA. Jt. App. 295-96. The EPA attorneys who advised Ms. Lavelle were listed for the trial court, including Messrs. Perry, Yamada, Brown and Kurent. Jt. App. 300. Counsel for Ms. Lavelle again argued that "[t]he lawyer is therefore bound also by all the general ethical standards of the Code of Professional Responsibility." Jt. App. 304. Counsel raised the issue of attorney misconduct, bias and a "set-up," as follows:

> Now, the question arises, when did Mr. Perry make the decision that there was a conflict arising here. There was an attorney-client relationship. He was continually giving her legal advice in her job as Assistant Administrator. But at some point he changed hats or at least he wore two hats at the same time, a white hat and a black hat. In one case he was advising her. On the other hand, he was attempting to incriminate her by gathering evidence citing her or alleging criminal activities.
>
> The question is, when did he make this decision; when should he have made that decision; and that there was the duty on his part under all the ethical standards that he should have advised her, if he could not represent her adequately, that she should get legal counsel.

Jt. App. 308. Counsel for Ms. Lavelle asked that the grand jury testimony of these agency attorneys be suppressed, that the Statement of Certification upon which four counts of the indictment were based and which was signed by Ms. Lavelle after discussions with agency attorneys be suppressed, and that any testimony of these agency attorneys at trial be suppressed. The trial court denied the motion to suppress testimony of the agency attorneys. Jt. App. 356. The court also denied the motion to suppress with respect to the Statement of Certification. *Id.*

At trial, there was testimony from three EPA attorneys who had advised Ms. Lavelle concerning her Stringfellow recusal. These three crucial prosecution witnesses were Gerald Yamada, Acting Deputy General Counsel (Jt. App. 659); Michael Brown, Enforcement Counsel (Jt. App. 589); and Edward Kurent, Association Enforcement Counsel (Jt. App. 507). Ms. Lavelle's counsel attempted full cross-examination of these witnesses regarding their failure to advise Ms. Lavelle to seek her own counsel and their action in forwarding to Congress a statement of material facts which they knew contained substantial inconsistencies with what they knew to be the facts. The trial court would not permit Ms. Lavelle's counsel to develop this argument through full cross-examination, through use of the CPR to establish the proper attorney conduct, and through Ms. Lavelle's direct testimony.

On cross-examination of Mr. Brown, counsel for appellant established that as of December 9, 1982 Mr. Brown thought "[i]t was clear we had something here that could look bad." Jt. App. 635. It was established that Mr. Brown was a member of the District of Columbia Bar (Mandatory). Jt. App. 590. When counsel attempted to cross-examine Mr. Brown concerning the provisions of the District of Columbia Code of Professional Responsibility, the trial court cut off such questions, stating, "[i]t has absolutely nothing to do with this case, certainly not

on cross-examination." Jt. App. 636. When counsel sought to develop this argument in appellant's direct case by proffering related evidence concerning Ms. Lavelle's state of mind when she signed the crucial Statement of Certification, the prosecution objected, and the trial court sustained the objections, stating as follows:

> There is no reason for us to believe that there has been any type of entrapment, set-up or anything else. There has been no evidence that there would be such an alibi, because if there had been, I'm sure there would have been—well I'm just certain that we would have dealt with that at some other time.

Jt. App. 920. Also, on direct examination, Ms. Lavelle was asked, "Did anyone suggest to you at that time that you should consider hiring a lawyer?" Jt. App. 946. Her answer was "No." *Id.* The prosecution promptly objected and moved that the question and answer be stricken, stating, "Counsel has been told many times to avoid this." App. Jt. 946-47. The trial court stated twice, in open court, "[t]otally irrelevant," and then ruled as follows: "Ladies and gentlemen, please ignore the question and disregard the answer that was given. Totally irrelevant." Jt. App. 947.

The court of appeals herein did not address the issue of the attorney-client relationship between Ms. Lavelle and the senior EPA attorneys nor did it address the responsibilities of these attorneys with respect to testimony against Ms. Lavelle in a criminal proceeding on matters for which they had advised her during the conduct of agency business.

The court of appeals simply stated that Ms. Lavelle "never identified what she considers to be the 'set up' involved with regard to the conduct of the EPA attorneys." App. A, *infra*, 8a. The court of appeals evidently overlooked the extensive discussion on this subject in Ms. Lavelle's brief. Br. 38-51. Ms. Lavelle carefully summarized the testimony of three EPA attorneys

(Messrs. Yamada, Brown and Kurent) and listed 14 facts which demonstrated attorney conduct in violation of the District of Columbia Code of Professional Responsibility and a deliberate effort to discredit Ms. Lavelle by forwarding to the Justice Department an allegation of improper conduct and, when this attempt failed because the allegations were proven to be unfounded, by forwarding to Congress a statement signed by Ms. Lavelle, which they knew contained substantial inconsistencies with what they had determined to be the facts. *Id.*

The court of appeals stated that Ms. Lavelle ". . . put in the statement just what she wanted to." App. A, *infra*, 5a, n.2. We suggest this is not correct. She signed the Statement of Certification because it was correct according to her interpretation at the time she made it, *i.e.*, on December 13, 1982 (some six months after the May 28, 1982 meeting). The court of appeals also stated that Ms. Lavelle could not have been "duped into signing the statement if she still believes it to be true." App. A, *infra*, 8a. The point was missed. The EPA General Counsel and his deputy did not inform Ms. Lavelle that they had called Mr. Kurent and heard a conflicting story after she signed the statement. Jt. App. 694-97. They had a duty to inform Ms. Lavelle and give her the opportunity to investigate further and to confirm the facts.

The trial court summarily precluded Ms. Lavelle's efforts to demonstrate this ethical duty to the jury. Had the trial court permitted Ms. Lavelle to demonstrate this duty, the jury may have found properly that EPA attorneys had ill will toward Ms. Lavelle, and were biased against her, or were attempting to "set her up"—to send her signed statement (which she believed to be correct) to Congress immediately, knowing from facts which they were able to put together after Ms. Lavelle signed the statement, that it was probably incorrect. This would have weighed significantly in the jury's evaluation of the credibility of Messrs. Brown and Yamada, two crucial witnesses to events surrounding Ms. Lavelle's Statement.

A finding of breach of duty and, consequently, bias, would have permitted the jury to consider Ms. Lavelle's contention that she believed the statement was correct at the time she made it.

Because the court of appeals misapprehended Ms. Lavelle's position in her Statement of Certification, her theory of bias was considered illogical. The court misplaced its emphasis by stating that Ms. Lavelle's theory of bias was that EPA lawyers desired to cover up or obscure ethical violations. App. A, *infra*, 12a. That is not the major point. The theory of bias is simply stated. The attorneys had a duty to inform her.[4] They did not. Therefore, a reasonable juror might have concluded that (a) given this ethical duty, and (b) in light of the breach of this ethical duty, the EPA lawyers must have had a reason—they were biased against Ms. Lavelle.

The court of appeals observes that the jury was exposed to certain "facts" upon which Ms. Lavelle bases her bias argument. The jury was not, however, exposed to the ultimate fact: that EPA attorneys were under an ethical duty as lawyers to (a) inform Ms. Lavelle that her version had been materially contradicted by a fellow attorney (Mr. Kurent) and (b) permit Ms. Lavelle the opportunity for further review, reflection and clarification. The jury did not learn this information. For all the jurors knew, the General Counsel and his deputy had no duty or responsibility to tell Ms. Lavelle that they knew her statement had been contradicted by Mr. Kurent, a crucial prosecution witness at trial. The crucial link to a finding of bias—evidence of an attorney's duty to inform his client of potentially incriminating and contradictory information—was lost to the defense as a result of the trial court's knowing preclusion of cross-examination utilizing the CPR.

An attorney-client relationship was established between Ms. Lavelle and the EPA attorneys during the time that

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[4] The court of appeals did not treat this duty, nor did it decide whether a duty existed on the facts herein.

Ms. Lavelle was engaged in the conduct of agency business. During that time Ms. Lavelle received advice from her EPA attorneys on the same matters which subsequently formed the basis for criminal charges against her. Permitting those attorneys to testify against Ms. Lavelle before the Grand Jury and at trial, and having testified, the knowing preclusion of relevant and important cross-examination on the CPR constitutes a violation of Ms. Lavelle's Sixth Amendment right to confront witnesses and a denial of Ms. Lavelle's Fifth Amendment right to due process.

The Introduction of Similar Acts Evidence Which Was Not Relevant to Counts One and Two Was Prejudicial to Petitioner and Constitutes a Denial of Due Process

Under the Federal Rules of Evidence, two rules provide the framework within which the admissibility of similar acts testimony must be considered. Rule 404(b) contains the limited set of purposes for which similar acts testimony is deemed relevant. Even if relevant, however, evidence that a defendant has committed a similar act is likely to be prejudicial, for juries may be tempted to use evidence of other transgressions as the basis of convicting a defendant of the crime for which he is charged.[5] As a result, the trial judge must also consider Rule 403, which directs that evidence be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Fed. R. Evid. 403. These rules must be considered in tandem to determine whether similar acts evidence is admissible.

The starting point for the analysis is Rule 404(b), which states: "Evidence of other crimes, wrongs or acts

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[5] *United States v. James*, 555 F.2d 992, 1000 (D.C. Cir. 1977), citing *United States v. Phillips*, 401 F.2d 301, 305 (7th Cir. 1968). *Cf.* Underhill, Criminal Evidence, § 205 (5th ed. 1956), quoted in *Drew v. United States*, 118 U.S. App. D.C., 15-16 n. 8, 331 F.2d 85, 89-90 n. 8 (1964).

is not admissible to prove the character of a person in order to show that he acted in conformity therewith. . . ." Fed. R. Evid. 404(b). The rule then lists "other purposes" for which similar acts may be admitted, among which is "proof of . . . intent."

Rule 404(b) addresses only "other crimes, wrongs or acts," however, discussion in the case law most frequently refers to "prior" bad acts, thus implicitly differentiating these acts from "subsequent" similar acts. Although subsequent similar acts are not explicitly excluded by the rule, in practice they seldom meet the requirement that the similar acts be closely related to the acts charged, particularly where, as herein, the justification for introducing the similar act is to provide proof of intent.

In the instant case, the two similar acts for which evidence was admitted were alleged instances of lying to Congress on February 23 and 24, 1983. The alleged similar acts occurred some 72 days *after* the events on which the charges were based for Counts One and Two. These similar acts involved alleged perjurious testimony to Congress by Ms. Lavelle concerning a meeting with New York State environmental officials and alleged perjurious testimony concerning her access to documents which were removed from her office immediately following her resignation. These events were totally unrelated to Ms. Lavelle's actions on the evening of December 13, 1982 when she signed the Statement of Certification. They had no relevance to her intent to deceive when she signed the Statement. The only common thread which connected the similar acts to the events of December 13, 1982 was the implication that because she did not tell the truth to Congress on February 23 and 24, 1983 she purposely and with intent to deceive signed a false statement on December 13, 1982 on issues totally unrelated to her alleged false testimony on February 23 and 24; that because she lied on February 23 and 24 she must have lied 72 days earlier on December 13, 1982, *i.e.*, that because she was a

bad person in February 1983 she was a bad person on December 13, 1982. However, this is precisely the inference that Rule 404(b) prohibits.

Neither the trial court nor the appellate court appeared to recognize that the similar acts evidence which was admitted concerned acts which occurred some 72 days *after* the events charged in Counts One and Two. In fact, the court of appeals explicitly misstated this point when it stated "the time separating the events charged in the indictment and the other bad acts was minimal; *all involved the same congressional hearings*" (emphasis added). App. A, *infra*, 21a. This is incorrect. The events charged in Counts One and Two of the indictment occurred on December 13, 1982, 72 days before the alleged similar acts. Thus, even the court of appeals was misled by the prosecution's efforts to create a "spill-over" from the similar acts testimony to the crucial events of December 13, 1982. In addition, the court of appeals repeatedly referred in its opinion to the similar acts as "prior" acts. App. A, *infra*, 17a, 18a, 21a, 24a. Furthermore, all cases cited by the court of appeals involved prior or contemporaneous acts.[6]

United States v. James, 555 F.2d 992 (D.C. Cir. 1977), is indicative of the problems which result when evidence of "subsequent" acts is introduced as probative of intent. In *James* the prosecution introduced evidence of acts which occurred 16 days after the acts for which the defendant was charged. The court of appeals found that the evidence was improperly admitted because it was not probative of intent and the inferences necessary to connect it with the events charged were too weak.

Conviction on Counts ONE and TWO was crucial to the jury's finding that Ms. Lavelle was guilty on Counts

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[6] *See United States v. DeLoach*, 654 F.2d 763 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); *United States v. Childs*, 598 F.2d 169, 173-74 (D.C. Cir. 1979); *United States v. Ross*, 321 F.2d 61, 67 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

Three and Four. Without the inference of bad character provided by the similar acts testimony, the jury had no basis for determining that Ms. Lavelle had an intent to deceive when she signed the Statement of Certification on December 13, 1982. Without a finding of guilty on Counts ONE and TWO, the jury might well have found Ms. Lavelle not guilty on Counts Three and Four because these counts involved Ms. Lavelle's intent to deceive Congress on the same facts which were contained in the Statement of Certification. Therefore, the prosecution was able to "bootstrap" a conviction on all four counts through the "spillover" effect of the bad character inferences from the similar acts evidence which was not relevant and therefore should not have been admitted with respect to Counts ONE and TWO. The guilty finding on these counts facilitated the jury's finding of guilty on Counts Three and Four.

The similar acts evidence admitted by the trial court was not relevant to Counts One and Two and therefore was not probative of Ms. Lavelle's intent to deceive in her December 13, 1982 Statement of Certification. Because of the potential for such evidence to be perceived by the jury as evidence of bad character, it presented the danger of unfair prejudice, confusion of the issues, and misleading of the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5060

UNITED STATES OF AMERICA

v.

RITA M. LAVELLE,

Appellant

Appeal from the United States District Court
for the District of Columbia
(D.C. Crim. No. 83-0184)

Argued September 7, 1984

Decided January 18, 1985

Mark B. Bierbower and *Roy D. Snyder, Jr.*, with whom *James J. Bierbower* was on the brief, for appellant.

George Allen Carver, Jr., Attorney, U.S. Department of Justice, for appellee.

Before TAMM and EDWARDS, *Circuit Judges*, and WILKEY,* *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* TAMM.

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* Senior Circuit Judge Wilkey did not participate in the resolution of this case.

TAMM, *Circuit Judge*: The former Assistant Administrator of the Environmental Protection Agency (EPA), Rita M. Lavelle, appeals her conviction for perjury and obstruction of justice. The charges stemmed from testimony given to congressional committees in February 1983 concerning her participation in the administration of the EPA's "Superfund" program in matters affecting her former employer, Aerojet-General Corporation. Ms. Lavelle contends that the trial court erred by 1) improperly restricting cross-examination of EPA attorneys; 2) restricting direct examination of Ms. Lavelle, thereby depriving her of an opportunity to establish her state of mind during the events in question; and 3) admitting unfairly prejudicial evidence of other instances of false testimony. For the reasons expressed below, we affirm the conviction.

I. BACKGROUND

Prior to her 1982 nomination to become the EPA's Assistant Administrator in charge of the Office of Solid Waste and Emergency Response, Ms. Lavelle was the Director of Communications for the Aerojet Liquid Rocket Company, a division of Aerojet-General Corporation. During the confirmation process, Ms. Lavelle wrote a memorandum to Robert Perry, General Counsel of the EPA, agreeing "not to participate in any EPA matter which specifically involves Aerojet-General or its subsidiaries for the term of my appointment with EPA." Trial Transcript (Tr.) 332, 970-71, Joint Appendix (J.A.) 616, 973-74. During her confirmation hearings before the Committee on Environment and Public Works of the United States Senate (the Senate Committee), Ms. Lavelle orally confirmed her written commitment. *Id.*

After Aerojet had been identified as a "responsible party" [1] in connection with the Stringfellow toxic waste

[1] A "responsible party" is defined by the EPA as a person or organization identifiied by the EPA as being actually or potentially responsible for toxic waste as a disposal site.

disposal site in Riverside County, California, Ms. Lavelle on June 18, 1982 signed a "site specific" recusal, recusing herself from any involvement in the Stringfellow site. On December 14, 1982, Ms. Lavelle signed a "Statement of Certification" (the Statement), which states that she first learned of Aerojet involvement on June 17, 1982 and promptly thereafter recused herself. During Senate hearings on Superfund mismanagement in February 1983, Ms. Lavelle orally confirmed the December 1982 Statement of Certification.

Government witnesses testified at trial that Ms. Lavelle knew of Aerojet involvement in Stringfellow three weeks before she signed the June 18, 1982 "site specific" recusal, directly contradicting her Statement of Certification and sworn testimony. The evidence revealed that Ms. Lavelle learned of Aerojet's involvement at Stringfellow on May 28, at which time a member of her staff suggested that she recuse herself. Tr. 77, 91, 170, 187-88, J.A. 451, 457, 493, 510-11. On May 31, 1982, Ms. Lavelle discussed Aerojet's participation in the Stringfellow site with John Andreason, General Counsel and Vice President of Aerojet. Tr. 420-24, J.A. 706-10. On June 2, 1982, Ms. Lavelle held a weekly staff meeting, during which the Stringfellow matter was discussed. Ms. Lavelel received a status report about Stringfellow and discussed sending out notice letters to the Stringfellow contributors. Tr. 26-28, J.A. 438-40. Ms. Lavelle's confidential assistant testified that on June 3 or 4, Ms. Lavelle told her that Aerojet was a contributor at the Stringfellow site. Tr. 523-24, J.A. 789-90.

The following week Deborah Dalton, a scientist on Ms. Lavelle's staff, prepared a three-page memorandum outlining what EPA's position should be on the Stringfellow site. Tr. 174, J.A. 497. On June 14, Ms. Lavelle instructed her staff to send an "eyes only" copy of the "Dalton Memorandum" to the regional administrator responsible for the Stringfellow site.

After hearing that Ms. Lavelle had communicated with the regional administrator about the Stringfellow site, Edward Kurent, who had first raised the Aerojet involvement and the need for recusal, suggested to Robert Perry, EPA General Counsel, that a recusal statement be prepared for Ms. Lavelle's signature. Ms. Lavelle signed the recusal statement on June 18, 1982 and thereafter had no involvement with the Stringfellow site.

In late summer 1982, the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the United States House of Representatives (the House Oversight Subcommittee) directed a subpoena to Michael Brown, an EPA staff attorney, requesting all documents relating to the Stringfellow matter. In the course of sifting through documents, Mr. Brown found the June 14, 1982 Dalton Memorandum. Because the Memorandum suggested that Ms. Lavelle might have violated her March 1982 promise to the Senate Committee not to participate in matters affecting Aerojet-General, Mr. Brown recommended to Mr. Perry, his superior, that the document be forwarded to the Subcommittee.

Mr. Perry then scheduled a meeting with EPA Administrator Anne Burford, EPA Chief of Staff John Daniel, and Ms. Lavelle. Mr. Perry began the meeting by telling Ms. Burford that his staff had uncovered a document that indicated that Ms. Lavelle may have violated her March 1982 recusal. Ms. Lavelle defended her actions by noting that the Dalton Memorandum predated her June 18 "site-specific" recusal. Ms. Burford directed that the memorandum be forwarded to Congress along with an affidavit from Ms. Lavelle explaining her involvement in the Stringfellow site.

Mr. Daniel, Mr. Perry, and Ms. Lavelle left the meeting and immediately thereafter drafted a "Statement of

Certification," which Ms. Lavelle signed under oath.[2] The Statement said in part:

> At that time, [the evening of June 17] for the *first* time, I was told that an Aerojet-General subsidiary was cited as one of the possible responsible parties. I immediately left the briefing and executed a recusal statement.

J.A. 1091 (emphasis in original). The Statement and the Dalton Memorandum were forwarded to the House Oversight Subcommittee. Counts One and Two of the indictment were predicated upon the falsity of this Statement.[3]

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[2] There is conflicting testimony as to the authorship of the "Statement of Certification." In her affidavit to the trial court, Ms. Lavelle stated that it had been drafted by Michael Brown. Joint Appendix (J.A.) 81. On cross-examination, Ms. Lavelle stated that it was drafted by Gerald Yamada. Trial Transcript (Tr.) 478, J.A. 981. For his part, Mr. Brown testified that he did not prepare the Statement and did not know who did. Tr. 328, J.A. 622. At any rate, Ms. Lavelle was given the opportunity to change the dates on the Statement. She testified on cross-examination that "no one made [her] say that," Tr. 979, J.A. 982, and that she put in the Statement just what she wanted to. Tr. 978, J.A. 981.

[3] Count One alleged that the Statement of Certification comprised a false statement in violation of 18 U.S.C. § 1001 (1982), which states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Count Two alleged that Ms. Lavelle obstructed the congressional committee by causing the Statement to be sent to that committee in violation of 18 U.S.C. § 105 (1982), which states in relevant part:

On February 23, 1983, Ms. Lavelle, in testimony under oath before the Senate Committee, substantially reaffirmed her position as articulated in the Statement of Certification:

> I found out Thursday night [June 17, 1982] for the first time that Aerojet was one of the many companies who had dumped at this site, and then I recused myself according to my commitment to this committee.
>
> * * * *
>
> . . . because of a briefing Thursday evening, a late briefing where I was for the first time presented with the list of responsible parties . . . I immediately recused myself . . . .
>
> * * * *
>
> um hum. [In response to a question, 'and you recused yourself on Friday the 18th, immediately upon learning of it; is that correct?']

Count Three of the indictment was predicated upon the falsity of this testimony.

On February 24, 1983, Ms. Lavelle gave substantially similar testimony before the House Oversight Subcommittee:

> I had no knowledge whatsoever that Aerojet-General's, one of Aerojet-General's subsidiaries,

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Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee or either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> would be one of the 250 universe [potential disposers] until the evening, Thursday evening—I was looking for the date—I believe it is the 17th . . . The 17th. Thursday evening, is when for the first time I saw a list of disposers . . . I left the meeting and my staff prepared a letter of recusal which I signed the next morning . . . .
>
> * * * *
>
> I became aware of the alleged Aerojet connection the Thursday evening, June 17th when I recused myself . . .
>
> That is correct. [In response to the question, 'And it was not until that time that you knew of any involvement of your company?']

Count Four of the indictment was predicated upon the falsity of this testimony.[4]

After a jury trial, Ms. Lavelle was found guilty of four of the five counts brought against her. She was sentenced to six months in prison and fined $10,000.

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[4] Counts Three and Four alleged that Ms. Lavelle committed perjury in her testimony to the Senate Committee and the House Oversight Subcommittee, respectively, in violation of 18 U.S.C. § 1621 (1982), which provides

> Whoever—
>
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . .
>
> is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

II. Limitation of Cross-Examination of EPA Attorneys

Ms. Lavelle claims that the trial court erroneously denied her an opportunity to show a "set up," attorney misconduct, and bias during cross-examination of EPA attorneys. Although stated in broad terms, Ms. Lavelle cites only one instance in which cross-examination of EPA attorneys was limited. During cross-examination of Michael Brown, at relevant times one of the three top EPA attorneys, defense counsel tried to ask whether he was familiar with the Code of Professional Responsibility. The trial court sustained the government's objection, ruling that the question was beyond the scope of direct examination and irrelevant.

Ms. Lavelle, however, has never identified what she considers to be the "set up" involved. She does not allege that Brown or the other EPA attorneys singled her out as an EPA official deserving protection. She does not raise an entrapment defense. Moreover, her vague allegations that she was "duped" into signing the Statement of Certification is directly contradicted by her own testimony. In an affidavit to the trial court, Ms. Lavelle swore that she still believed that the Statement was true. During cross-examination, Ms. Lavelle stated she stood by the Statement as an accurate account of the events as she understood them at the time she signed the Statement.[5] It is, therefore, difficult to conceive how Ms.

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[5] In an affidavit to the trial court, Ms. Lavelle stated that she considered "this statement to be a legal document, prepared and reviewed by my legal counsel, based on information presented in confidence by me, which at that time I believed to be true to the best of my knowledge and belief, and which I still believe to be true to the best of my knowledge and belief." J.A. 81. During cross-examination of Ms. Lavelle, the following colloquy concerning the Statement of Certification took place:

Lavelle could have been duped into signing a statement which, after almost two years of cool reflection, she still believes to be true.

This leaves Ms. Lavelle's contention that the inquiry concerning the Code of Professional Responsibility was designed to impeach the testimony of the EPA attorneys. On cross-examination,[6] the defense tried to impeach Brown by eliciting testimony about his friendship with Mr. Perry and his personal contact with people on the House Committee. Brown testified, over the prosecution's objections, that during Mr. Perry's absences he acted as the chief ethics officer for the EPA. After the defense retracted much of his testimony, the following colloquy took place:

> Q: [By Defense Counsel] Let's go back to your duties as ethics officer. Where did you attend law school?
>
> A: [By Mr. Brown] Saint Mary's University, University of Virginia and Georgetown University Law Center.
>
> Q: And I assume you studied the Code of Responsibility there did you not?
>
> A: Yes.

Q. [by the government]: But no one made you say that. That is your position, isn't it?

A. [by Ms. Lavelle]: It's a pretty good statement of the position, yes.

Tr. 979, J.A. 982.

[6] The direct examination of Brown was limited to his discovery in early December 1982 of the "Dalton Memorandum" which indicated that Ms. Lavelle might have dealt improperly with a situation in which she had recused herself. Brown's subsequent discussion with Robert Perry about the memorandum led to the December 17 meeting between Ms. Lavelle, Ms. Burford, and Mr. Perry. During the meeting, Ms. Burford requested that Ms. Lavelle document her participation in the Stringfellow site. Tr. 350, J.A. 642. Ms. Lavelle's documentation, the Statement of Certification, is the basis for Counts One and Two of the indictment.

Q: And you are aware of the Code of Professional Responsibility?

A: As a general code, I would hate to have to recite any particular specific section thereof.

Q: Well, as ethics officer assistant, you examined it from time to time, didn't you?

[By the Prosecution] Objection, your honor. Outside the scope and irrelevant.

The Court: Clearly outside the scope.

[By the Defense Counsel]

Q: Are you familiar with—let me try this again, your honor.

The Court: As I said, it is clearly outside the scope of direct examination.

At which time the parties approached the bench:

(At the Bench)

Mr. Bierbower: Your honor, I just want to ask him about one specific provision of the code to see if he is aware of it.

The Court: Which Code?

Mr. Bierbower: The one in effect in the District of Columbia. He is a member of the bar here.

Mr. Hendricks: Your honor, what counsel is doing is trying to put his case in through our witness. If he wants to call the witness, he is free to do it.

The Court: He certainly is. But you are talking about the Code of Professional Responsibility?

Mr. Bierbower: Yes.

The Court: It has absolutely nothing to do with this case, certainly not on cross-examination.

Tr. 340-42, J.A. 634-36.

Ms. Lavelle contends that the excluded evidence precluded her from developing "the possibility that the testimony of certain EPA attorneys may have been motivated by a desire to avoid prosecution and to cover up or ob-

scure violations of professional ethics." Brief for Appellant at 49. This is not the explanation for the question defense counsel offered at trial. At the bench conference, defense counsel's only comment was, "I just want to ask him about one specific provision of the Code to see if he is aware of it." Federal Rule of Evidence 103(a)(2), however, limits reversible error to those instances in which "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." As the court stated in *Cheek v. Bates*, 615 F.2d 559, 563 (1st Cir.), *cert. denied*, 446 U.S. 944 (1980), "[r]eversal for a denial of the right to show bias on cross-examination . . . requires both an affirmative assertion of that right and a knowing decision by the judge to deny or limit it." [7] Defense counsel's comment at the bench conference did not even remotely constitute "an affirmative assertion" of the right to show bias.

Ms. Lavelle contends that the substance of the line of questioning about bias was made known to the trial court through pretrial motions and the context of the interrogation. Even if we accepted this contention, her theory of bias is entirely illogical. Ms. Lavelle states that the testimony of the EPA attorneys given at trial itself "demonstrated" violations of professional ethics because the attorneys forwarded the Statement to Congress knowing it contained substantial inaccuracies.[8] At the same time,

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[7] *See also* United States v. Winkle, 587 F.2d 705, 710 (5th Cir.) (inadequate offer of proof barred consideration on appeal), *cert. denied*, 444 U.S. 827 (1979); United States v. Muncy, 526 F.2d 1261, 1263 (5th Cir. 1976) (lack of offer of proof resulted in refusal to consider propriety of exclusion on appeal).

[8] The question concerning the Code of Professional Responsibility, however, was posed only to Mr. Brown and not to the other EPA attorneys, Mr. Yamada and Mr. Perry, who had more direct contact with Ms. Lavelle and were in a better position to advise Ms. Lavelle as to whether she should retain her own attorney.

she maintains that their testimony was "motivated by a desire to cover up or obscure violations of professional ethics," presumably their knowledge of the Statement's falsity. If the EPA attorneys in fact had been motivated by a desire to cover up their own ethical misconduct, however, it is difficult to see why they would have testified that they knew the Statement to be false when they submitted it to Congress. If we accept Ms. Lavelle's bias theory, the attorneys should have been eager to present evidence that tended to exculpate Ms. Lavelle, and hence themselves, from any wrongdoing. Contrarry to Ms. Lavelle's assertion that the attorneys were biased against her, all would appear to have a common interest—under her theory—in establishing, insofar as possible, the truthfulness of the Statement.

Moreover, even if we ignore the logical inconsistencies of her theory of bias, the defense had ample opportunity to present to the jury the facts upon which the propriety or impropriety of the EPA attorneys' role in the preparation of the Statement of Certification could be assessed. In her brief to this court, Ms. Lavelle, after exhaustively citing references to the trial record, claims that "[t]he above-described facts . . . demonstrate a conflict of interest and go to the very heart of the credibility of Mr. Yamada and Mr. Brown as prosecution witnesses." Brief for Appellant at 40. By Ms. Lavelle's own account, therefore, the jury was exposed to the "facts" upon which her claims of bias were based.[9] Once unraveled, therefore,

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[9] In her brief to this court, Ms. Lavelle asks:

> Why did Mr. Perry, Mr. Yamada, Mr. Brown and Mr. Kurent withhold from Ms. Lavelle information which contradicted her version of the Stringfellow recusal? . . . [W]hy did Mr. Perry and Mr. Yamada, the two top E.P.A. attorneys, forward to Congress a statement of material facts which they knew contained substantial inconsistencies with what they knew to be the facts?

Brief for Appellant at 43-44. Evidence forming the premises of these questions was presented to the jury. The jury plainly did not

Ms. Lavelle's argument on appeal reflects discontent with the jury's factual findings but articulates no basis for reversal.

III. Limitation of Direct Examination of Ms. Lavelle

Ms. Lavelle claims throughout her brief that the trial court impermissibly restricted her own direct examination. In one instance, the court excluded as "totally irrelevant" a question as to whether anyone ever suggested to Ms. Lavelle that she hire her own lawyer. Tr. 899, J.A. 946. Even if the question were relevant,[10] however, no harm resulted from its exclusion. Moments later Ms. Lavelle testified that she "saw no reason" to use her own lawyer: "if you tell the truth, you don't get in trouble and there's no reason to hire a lawyer." Tr. 900, J.A. 947. Furthermore, cross-examination of Mr. Brown, Ms. Daniel, and Mr. Yamada revealed that none of them recommended that Ms. Lavelle hire her own lawyer. Tr. 342, 347, 408, J.A. 636, 649, 696.

Second, appellant claims that the trial court erred by sustaining a relevancy objection to the following question posed to Ms. Lavelle: "Tell the jury, if you can, the status of relations between your office and Mr. Perry's office in the period from July to August 1982."

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make any inferences from these facts that disturbed a finding that Ms. Lavelle knowingly made materially incorrect statements.

[10] This line of inquiry seemed to be designed to show that, had Ms. Lavelle had adequate legal counsel, she would not have signed the Statement of Certification or given false testimony. *See* Brief for Appellant at 50 ("As a non-lawyer confronted with powerful agency attorneys, she was not informed of the import of her actions or the veracity of her recollection."). While this may be true, the statute under which Ms. Lavelle was convicted does not require that the defendant knowingly deceive *despite* adequate legal counsel. It would be novel indeed to condition criminal culpability upon the adequacy of legal counsel prior to commission of a particular offense.

Again, even if the question was not overbroad, excluding it resulted in no harm. After the bench conference, the court allowed a similar question—"Tell the jury what your relationship was with Mr. Perry at that time?"—to which Ms. Lavelle fully responded. J.A. at 929.

Finally, Ms. Lavelle claims that the trial court erred by sustaining "repeated objections" to defense counsel's attempts to introduce evidence concerning Ms. Lavelle's state of mind following her dismissal from the agency. Brief for Appellant at 72-77. For example, defense counsel asked Ms. Lavelle to describe what happened shortly after her firing "with respect to your life, and your telephone, and your whole being?" Tr. 938, J.A. 959. Although narrowed somewhat by the reference to Ms. Lavelle's telephone, a question encompassing Ms. Lavelle's "whole being" strikes us as necessarily overbroad. Although the federal rules do not require each question to be framed with model clarity, we cannot fault the trial court for sustaining the government's objection. We conclude, therefore, that the trial court committed no reversible error in limiting the direct examination of Ms. Lavelle.

IV. Other Bad Acts Evidence

A. *Introduction*

Ms. Lavelle contends that the trial court committed reversible error by admitting evidence of "other bad acts" introduced by the government at the end of the presentation of its case-in-chief. Since one of Ms. Lavelle's claims of error is the insufficiency of the proof of the other bad acts, we shall discuss the evidence in some detail. The government introduced two other instances in which Ms. Lavelle gave false testimony. The first instance of false testimony arose out of an April 8, 1982 meeting between Ms. Lavelle, Norman Rosenchuck, Director of the Division of Solid and Hazardous Waste for the New York State Department of Environmental Con-

servation, and Jacqueline Rams, former technical director of the Association of State and Territorial Solid Waste Management Officials. Mr. Rosenchuck and Ms. Rams testified that Ms. Lavelle angrily complained that her confirmation had almost been held up because of a letter Mr. Rosenchuck had sent to Senator Moynihan about the Love Canal waste disposal problem. Videotaped segments of February 1983 Senate Committee hearings, however, showed Ms. Lavelle testifying that the letter did not hold up her confirmation and that she never told Mr. Rosenchuck that his letter held up her confirmation. J.A. 1152, 1155-56.

The second instance of false testimony occurred during Ms. Lavelle's February 1983 testimony before the Senate Committee and the House Oversight Subcommittee. The government showed video tapes of Ms. Lavelle testifying to both committees that she had voluntarily turned over her 1982 appointment calendars to the committees. Ms. Lavelle also testified that she had not been given access to her records for the purposes of preparing for the testimony and that no one had delivered any documents from her office to her following her termination with the agency. J.A. 1145. Susan Baldyga, former Special Assistant to Ms. Lavelle, and Henrietta Janiszewski, former Confidential Assistant to Ms. Lavelle, testified that, in addition to the two calendars that had been turned over to the congressional committees, Ms. Lavelle kept a third calendar. That calendar included information about Ms. Lavelle's official responsibilities as well as her personal engagements. Tr. 503, 526, J.A. 769, 792. Ms. Janiszewski testified that certain "industry-type appointments" were to be posted on Ms. Lavelle's calendar, but not on the two "government" calendars kept by Ms. Lavelle's secretaries. Tr. 527, J.A. 793.

Ms. Baldyga also testified that on the day Ms. Lavelle was fired, February 4, 1983, she and Ms. Janiszewski were ordered by Mr. Wood, Ms. Lavelle's chief of staff,

to take specified documents out of Ms. Lavelle's office. The documents were loaded into three briefcases and put into the trunk of Ms. Baldyga's car. That evening, in a meeting with Ms. Lavelle in the latter's office. Ms. Baldyga told Ms. Lavelle that she had taken the documents. The next day, Ms. Baldyga returned to Ms. Lavelle's office and took some of Ms. Lavelle's rolodex cards, binders from Ms. Lavelle's credenza, and loose papers from Ms. Lavelle's desk and conference table. That evening, after dinner with Ms. Lavelle and other EPA staff, Ms. Baldyga transferred the documents from her car to the car of Mr. Ingold, former Director of Public Relations for Ms. Lavelle. Ms. Lavelle watched this transaction. The documents and briefcases were later seen by both Ms. Baldyga and Ms. Janiszewski at Ms. Lavelle's apartment.

Ms. Lavelle claims that the evidence of the other bad acts were insufficient to prove that these acts were actually committed, that the probative value of the evidence was substantially outweighed by its prejudical impact, and that the trial court mishandled the evidence in several respects.

B. *Legal Standards for Determining the Admissibility of Other Acts Evidence*

A fundamental tenet in our criminal jurisprudence is that a jury should not premise its verdict upon a general evaluation of the defendant's character but rather upon an assessment of the evidence relevant to the particular crime with which the defendant is presently charged. *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) (" 'a defendant must be tried for what he did, not for who he is' " (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978)). For this reason, Federal Rule of Evidence 404(b) establishes a broad prohibition against admission of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in con-

formity therewith." At the same time, the rule recognizes that bad acts evidence can legitimately be introduced for purposes other than to prove the defendant's bad character, such as to prove the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*[11] Introducing evidence of prior bad acts for a legitimate purpose, however, does not automatically cleanse the evidence of its unique quality of unfairly prejudicing the rights of the accused. *See United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980); *United States v. James*, 555 F.2d 992, 999 (D.C. Cir. 1977).[12] Therefore, under Rule 403 the probative value of the evidence must not be substantially outweighed by the unique dangers of unfair prejudice associated with evidence of other bad acts. *See United States v. Moore*, 732 F.2d 983 (D.C. Cir. 1984); *United States v. DeLoach*,

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[11] As this court stated in United States v. James, 555 F.2d 992, 999 (D.C. Cir. 1977), the "rule countenances admission of 'bad acts' evidence that is relevant to any material issue in the case except to show the likelihood that, having once fallen into sin, a second slip is likely." *See also* 2 J. Weinstein & M. Berger, Evidence § 404[08], at 404-44, 45 (1982) ("Only one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely than men generally to have committed the act in question.").

[12] In United States v. Shelton, 628 F.2d 54, 56 (D.C. Cir. 1980), this court stated: "These carefully delineated rules exist because of the enormous danger of prejudice to the defendant that evidence of other crimes creates. We have recognized before that juries are prone to draw illogical and incorrect inferences from such evidence." *See also* United States v. Beechum, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting) ("[Rule 404(b)'s] purpose is to caution us that extrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence."), *cert. denied*, 440 U.S. 920 (1979); C. McCormick, Evidence § 190 at 565 (3d ed. 1984) ("the fact that there is an accepted logical basis for the evidence other than the forbidden one . . . may not preclude the jury from relying on a defendant's apparent propensity toward criminal behavior").

654 F.2d 763 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). *See also* Fed. R. Evid. 404 advisory committee note.

C. *Rule 404(b)*

1. Relevancy to Intent

The government claims that it introduced the prior bad acts evidence to prove Ms. Lavelle's intent in making the false statements. Although Ms. Lavelle has never conceded the falsity of her statements, the intent with which she made the statements has been the primary contested issue in the case. Ms. Lavelle contended that she did not intend to deceive Congress. She was confused, under tremendous pressure, and influenced by EPA attorneys who "duped" her into signing the false Statement of Certification. Had she known the Statement to be false, Ms. Lavelle claimed, she neither would have signed the Statement nor relied on the Statement in oral testimony.

To rebut Ms. Lavelle's claims, the government attempted to prove that her false statements were not the product of a confused recollection but rather the result of a calculated effort to vindicate her role in the administration of the EPA by deliberately deceiving Congress. Evidence of Ms. Lavelle's false testimony in other instances was therefore relevant to her specific intent to deceive and not merely evidence of Ms. Lavelle's general bad character. The evidence, therefore, clearly passes the threshold test under rule 404(b). *See United States v. DeLoach*, 654 F.2d 763 (D.C. Cir. 1980) (allowing the introduction of prior bad acts evidence to show the intentional filing of false statements), *cert. denied*, 450 U.S. 933 (1981); *United States v. Childs*, 598 F.2d 169, 173-74 (D.C. Cir. 1979) (allowing the introduction of prior crimes evidence to show the specific intent to obstruct the carriage of mail). *See also United States v. Ross*, 321 F.2d 61, 67 (2d Cir.) (proper to admit evidence that defendant, charged with securities fraud, who claimed that he had

been duped by his employer, had drifted among firms engaged in selling worthless securities), *cert. denied*, 375 U.S. 894 (1963).

2. Sufficiency of the Evidence

Ms. Lavelle claims for the first time in her Reply Brief that the government's proof of the other bad acts was not "clear and convincing." Reply Brief for Appellant at 18-27. We agree that the relevancy of other bad acts is contingent upon whether the other acts actually occurred, but the government need not prove that the defendant committed the other act "beyond a reasonable doubt." Rather, as this court stated in *United States v. Moore*, 732 F.2d 983, 988 (D.C. Cir. 1984), the government must only present "clear and convincing proof to support a jury finding that the bad acts alleged in fact occurred." *But see Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (en banc) (holding that the proper test is "whether the evidence would support a finding").

To prove that Ms. Lavelle lied both to Mr. Rosenchuck and to the Senate Committee, the government presented two witnesses who directly contradicted Ms. Lavelle's testimony to Congress. The events surrounding the meeting with Mr. Rosenchuck were sufficient for a jury to conclude that Ms. Lavelle did not make an innocent misstatement, but rather deliberately misrepresented herself.[13] In the second instance, the government presented two witnesses, each of whom testified that Ms. Lavelle had in fact not turned over all of her appointment calendars as she had sworn to Congress. The evidence showed that the sen-

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[13] The testimony revealed that Ms. Lavelle intended to harass Mr. Rosenchuck by falsely claiming that his actions delayed her confirmation. Ms. Lavelle sarcastically referred to Mr. Rosenchuck as "Mr. Ambassador," made threatening remarks to him, and instructed him not to communicate with members of Congress without first obtaining her consent. Tr. 475-77, 487-90, J.A. 742-44, 754-57.

sitive nature of the information kept on Ms. Lavelle's calendar—appointments with representatives of regulated industries—was such that Ms. Lavelle had a motive for keeping the third calendar from Congress. The testimony of Ms. Baldyga and Ms. Janiszewski also established convincingly that Ms. Lavelle had been given documents from her office after she had been fired—directly contradicting her sworn testimony. We therefore conclude that the government met its burden of proving the other bad acts by "clear and convincing" evidence.[14]

D. *Rule 403 Balancing Test*

Ms. Lavelle argues that the evidence of other bad acts, even if relevant to the issue of intent, was substantially outweighed by its unfairly prejudicial effect and there-

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[14] It is the strength of the evidence linking Ms. Lavelle to the other bad acts that makes her reliance on United States v. James, 555 F.2d 992 (D.C. Cir. 1977), misplaced. In *James*, the defendant, charged with possession of heroin with the intent to distribute, challenged the government's introduction of evidence of a subsequent arrest. The issue in *James* was whether the defendant's "presence in an apartment in which were found substantial quantities of heroin is probative of an intent to distribute other heroin sixteen days earlier." *Id.* at 1000. By not offering proof that the defendant in fact committed any crime that would be relevant to the offenses charged, the government asked the jury to make a series of tenuous inferences: first, that James knew of the presence of heroin in the subsequent arrest; second, that he intended to distribute the heroin. Even if these inferences could be made, the jury still had to make the final inference: that evidence of the subsequent intent to distribute was relevant to the charged crime. Because of the strength of the proof linking Ms. Lavelle to prior acts of deceit, however, the jury in this case is asked only to make the final inference: that is, that the evidence of the prior false statements increases the likelihood that Ms. Lavelle made the statements with the requisite intent to deceive. Furthermore, the government's presentation of the evidence in *James* featured the gratuitous presentation of sordid details of "guns, violent action and a wanted man." *Id.* at 1000. No such dramatic or inflammatory evidence is involved in this case.

fore should have been excluded under Rule 403. Ms. Lavelle also claims that the court erred by not providing an on-the-record evaluation of the Rule 403 test. In reviewing these claims, we note that "the balancing contemplated by Rule 403 is a matter within the discretion of the trial court and should be overturned on appeal only in cases of abuse of discretion." *Foskey*, 636 F.2d at 525.

1. Probative Value

In assessing the probative value of other acts evidence, this court has considered, *inter alia*, the similarity of the bad act with the charged offense, *see, e.g., United States v. Moore*, 732 F.2d 983, 989 (D.C. Cir. 1984) (probative value increases with similarity of offenses),[15] the time separating the two events, *see, e.g., United States v. Foskey*, 636 F.2d 517, 525 (D.C. Cir. 1980) (probative value decreases with the time separating the two events), and the prosecution's need for the evidence, *see, e.g., United States v. DeLoach*, 654 F.2d 763, 769 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

The evidence of the other bad acts in this case documented deeds extremely similar to those forming the basis of Ms. Lavelle's indictment: both involved misrepresentations concerning the propriety of her conduct as the Assistant Administrator of the EPA. Second, the time separating the events charged in the indictment and the other bad acts was minimal: all involved the same congressional hearings.

Finally, as discussed above, the other bad acts evidence was offered to establish a critical and seriously contested issue in the trial—Ms. Lavelle's specific intent to deceive.

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[15] The similarity factor, however, cannot be used uncritically: "The degree of similarity required . . . will depend on the evidential hypothesis which is being employed . . . ." 2 J. Weinstein & M. Berger, Evidence ¶ 404[12], at 404-68 (1982).

Direct evidence was unavailable to prove her subjective intent; evidence of other acts of perjury was necessary to rebut Ms. Lavelle's claim that her statements were innocent mistakes.

2. Unfair Prejudice

We cannot find that the probative value of this evidence was substantially outweighed by its prejudicial impact. The unique dangers of prejudice associated with the introduction of evidence of other bad acts include the danger that the jury may punish the defendant for the extrinsic offense and not for the charged offense, the danger that the evidence—though relevant to, for example, intent—will be used by the jury primarily for the impermissible purpose of inferring guilt from a general defect in character, and the danger that the evidence will inflame the jury into reaching an impassioned and irrational verdict.

Generally, the similarity of the other bad acts evidence to the charged offenses increases the danger that the jury will confuse the issues necessary to convict the defendant. *Beechum*, 582 F.2d at 915, n.20; 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 120 (1978). In this case, the other bad acts involved offenses extremely similar to the charged offenses. There was little danger, however, that the jury would confuse the offenses. Each "other bad act" involved discrete instances of false testimony that could not easily be confused with the charged offenses. In addition, the government introduced the evidence at the end of its case-in-chief, thereby enabling the jury to consider the probative value of the other bad acts evidence without confusing them with the charged offenses.[16] This is not a case in which the evidence is a

[16] Some courts have suggested that the presentation of other crimes evidence should await the conclusion of the defendant's case, when the trial court will best be situated to "balance the probative worth of, and the Government's need for, such testimony against the prejudice to the defendant." United States v. Benedetto,

mere undocumented record of general misbehavior, designed to paint a vague picture of the defendant as someone who deserves punishment, regardless of whether the particular crime was ever committed. *Compare United States v. Shelton*, 628 F.2d 54, 57 (D.C. Cir. 1980) ("Where the evidence is presented by innuendo, it is less likely that the jury will guard against manipulation."). Instead, the presentation of the evidence was simple and clear, surrounded by careful limiting instructions.

Moreover, the character of the other bad acts evidence itself was hardly the kind that compels the jury irrationally to convict a defendant because she is a bad character. Video tapes of congressional hearings are unlikely to incite the jury to an irrational decision by their sheer force on human emotions.

Finally, the manner in which the government presented the evidence guarded against unfair prejudice. We have repeatedly recognized that the prosecution can jeopardize a conviction by imprudent use of other bad acts evidence. *See United States v. Foskey*, 636 F.2d 517, 524 n.6 (D.C. Cir. 1980) ("In reviewing the record, we take into account not only the evidence itself, but also the manner in which it was presented to the jury."). In this case, however, the government informed the defense prior to trial

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571 F.2d 1246, 1249 (2d Cir. 1978); *see also* United States v. Jones, 476 F.2d 533, 537 (D.C. Cir. 1973) (per curiam). Indeed, when it is unclear whether the defendant will raise a particular defense, such as entrapment, or concede a particular issue, such as identity, the trial court should exercise its discretion and wait to admit other bad acts evidence until it is apparent that it will involve a contested issue. In this case, however, it was clear from the outset that Ms. Lavelle would deny that she made the false statements with the requisite intent to deceive. Under such circumstances, the judge, by the completion of the government's case-in-chief, could assess the probative value of the other bad acts evidence. *See* United States v. Olsen, 589 F.2d 351 (8th Cir. 1978) (no abuse of discretion to introduce prior crimes evidence prior to defendant's case when defendant's opening statement raised lack of knowledge as a defense), *cert. denied*, 440 U.S. 917 (1979).

that prior bad acts evidence was to be introduced, *see Foskey*, 636 F.2d at 525 n.8 (suggesting that government attorneys inform defense counsel before trial of intention to introduce evidence of prior bad acts), and avoided making careless references to the prior bad acts evidence in opening statement. *See United States v. DeLoach*, 654 F.2d 763, 772 (D.C. Cir. 1980) (Tamm, J., concurring) (criticizing government attorneys for carelessly referencing prior bad acts in opening remarks), *cert. denied*, 450 U.S. 933 (1981). *See also Grimaldi v. United States*, 606 F.2d 332, 340 n.9 (1st Cir.) (admonishing government attorneys not to take "unnecessary risk of injecting the danger of irremediable prejudice" by reference in the opening statement to the defendant's prior offenses), *cert. denied*, 444 U.S. 971 (1979).

3. Requirement of an on-the-record articulation of the Rule 403 balance.

Ms. Lavelle claims that the trial court's failure to provide an on-the-record articulation of the Rule 403 balancing test warrants a reversal of her conviction.[17] To sup-

[17] Ms. Lavelle also claims that the trial court erred by not requiring a complete presentation of the evidence of other bad acts outside the hearing of the jury before determining its admissibility. Brief for Appellant at 53. Ms. Lavelle does not cite, nor can we find, any authority supporting this requirement. *See* United States v. Moore, 732 F.2d 983, 986 (D.C. Cir. 1984) (affirming conviction when evidence of other bad acts was presented directly to the jury). The government made an adequate proffer of evidence to the trial court prior to the introduction of the evidence. In its trial brief, the government explained fully the other bad acts to be presented. J.A. 199-205. The government again explained the presentation to the court in the bench conference held prior to its introduction. Tr. 5-6, J.A. 443-44. Finally, the judge viewed segments of the video tape presentation prior to making her final admissibility determination. Tr. 440-42. Under the circumstances, we conclude that no reversible error was committed. *See* United States v. Bailey, 505 F.2d 417, 448 (D.C. Cir. 1974) (affirming trial court's handling of the evidence given the ultimate correctness of the ruling), *cert. denied*, 420 U.S. 961 (1975).

port her claim, Ms. Lavelle cites *United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1003 (1984), which held that it was reversible error for the trial court not to make an on-the-record determination that the probative value of the other bad acts evidence outweighs its prejudical impact. We agree with the Fifth Circuit that written findings assist appellate courts in determining whether the proper analysis was employed in the probative value/prejudicial impact evaluation. *See Foskey*, 636 F.2d at 525 n.7 ("The trial judge has the responsibility for making sure that the record reflects the balancing of the considerations articulated in Rule 403.").[18] We recognize, however, two important exceptions to this requirement: first, no reversal or remand is warranted unless the trial court refuses to make an on-the-record determination *in response to such a request*, *see Robinson*, 700 F.2d at 213; second, no reversal or remand is warranted if the "factors upon which the probative value/prejudice evaluations were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *Id.* Both exceptions are applicable to this case. First, at no time did defense counsel request that this determination be

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[18] As the court stated in *Robinson*:

> An express scaling on-the-record of probative value and prejudice would tend to ensure appropriate consideration at trial of all relevant factors, establish the basis for the court's ruling, and provide the needed record for proper appellate review. On-the-record findings and conclusions would thus further the efforts of both the trial and appellate court to follow the Rule 404(b) analysis . . . .

700 F.2d at 213.

We do not adress the necessity of on-the-record determinations under Rule 403 *generally*. The requirement of an on-the-record evaluation under Rule 404(b) is compelled by the unique "danger of prejudice to the defendant that evidence of other crimes creates." United States v. Shelton, 628 F.2d 54, 56 (D.C. Cir. 1980).

made "on-the-record." [19] Second, as our discussion above indicates, the record clearly reveals that the probative value of the evidence clearly outweighed its minimal prejudicial impact. We therefore conclude that the trial court committed no reversible error in failing to make an on-the-record finding that the prejudicial impact of the evidence was not substantially outweighed by the probative value of the other acts evidence.[20]

For the foregoing reasons, the judgment of the District Court is

Affirmed.

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[19] Before the other bad acts evidence was introduced, the trial court held a bench conference to determine the admissibility of the evidence. Tr. 234-40, J.A. 556-62. Defense counsel argued that the court should consider whether Ms. Lavelle in fact committed the other bad acts, whether the evidence was relevant to anything other than Ms. Lavelle's propensity to commit crimes, and whether the probative value was substantially outweighed by the prejudicial impact. The defense maintained in a somewhat conclusory fashion that the evidence was not relevant to intent or motive, but otherwise articulated no other specific objection to the other acts evidence. The trial court noted that the evidence was not relevant to motive, but rather to intent, and ruled that the evidence was admissible. Defense counsel did not respond. The government asked whether the evidence could be submitted directly to the jury, and the trial court answered affirmatively. The defense counsel was still silent. It was not until the next day of trial that the defense counsel awoke to the prospect of having the evidence presented directly to the jury. The trial court informed the defense that this had indeed been the ruling the day before. Even at this point, however, the defense did not request the judge to make an on-the-record determination of the admissibility of the evidence. Tr. 248-49, J.A. 564-65.

[20] We have also carefully considered contentions by defense counsel that the trial judge erred by not granting defendant's motion to dismiss the indictment because of a "totality of grand jury abuse" and motion to hold an evidentiary hearing thereon and find those arguments without merit. *See* Lawn v. United States, 355 U.S. 339 (1957).

APPENDIX B

DISTRICT OF COLUMBIA

Docket No. 83-184

RITA M. LAVELLE,

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

[Filed Jan. 11, 1984]

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date January 9, 1984

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

James J. Bierbower, Esquire

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of False Statements, 18 USC 1001, Count 1, Obstruction of Proceeding before a Congressional Committee, 18 USC 1505, Count 2, Perjury, 18 USC 1621, Counts 3 and 4.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SPECIAL CONDITIONS OF PROBATION

One (1) year to Three (3) years; Defendant is to Serve Six (6) months and Balance of sentence is suspended and Five (5) years Probation and a Fine of Three Thousand Dollars ($3,000.00) on Count 1;

One (1) year to Three (3) years; ESS Probation Five (5) years and a Fine of Three Thousand Dollars ($3,000.00) and defendant is to perform community service as directed by the Probation Office, on Count 2;

One (1) year to Three (3) years; Defendant is to serve Six (6) months and the balance of sentence is suspended and Five (5) years probation and a Fine of Two Thousand Dollars ($2,000.00) on Count 3;

One (1) year to Three (3) years, ESS Probation Five (5) years and a Fine of Two Thousand Dollars ($2,000.00) and defendant is to perform Community service as directed by Probation Office; Count 4; said sentences are to run concurrently. Payment of Fine is a special condition of probation. (Total Fine $10,000.00)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

[It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.]

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
1-9-84

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Criminal No. 83-0184

No. 84-5060

UNITED STATES OF AMERICA

v.

RITA M. LAVELLE,

Appellant

Appeal from the United States District Court for the District of Columbia

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[Filed Jan. 18, 1985]

Before: TAMM and EDWARDS, Circuit Judges, and WILKEY,* Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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* Senior Circuit Judge Wilkey did not participate in the resolution of this case.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: January 18, 1985

Opinion for the Court filed by Circuit Judge Tamm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 84-5060

UNITED STATES OF AMERICA

v.

RITA M. LAVELLE

[Filed Feb. 20, 1985]

Before: TAMM and EDWARDS, *Circuit Judges*, and WILKEY, Senior Circuit Judge

---

ORDER

Upon consideration of the appellant's petition for rehearing, filed February 1, 1985, it is

ORDERED, by the Court, that the petition is denied.

For the Court
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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* Senior Circuit Judge Wilkey did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 84-5060

UNITED STATES OF AMERICA

v.

RITA M. LAVELLE

[Filed Feb. 20, 1985]

Before: ROBINSON, Chief Judge, WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges

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ORDER

Appellant's suggestion for rehearing *en banc*, filed February 1, 1985, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

For the Court
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him . . . .

18 U.S.C. § 1001—Statements or entries generally:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or make any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or documents knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1505—Obstruction of proceedings before departments, agencies and committees:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either

House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1621—Perjury generally:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or

subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement of subscription is made within or without the United States.

Fed. Rules Evid. Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. Rule Evid. Rule 404—Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes:

(a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) *Other crimes, wrongs or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Disciplinary Rules, Code of Professional Responsibility, District of Columbia Bar

DR 7-102—Representing a Client Within the Bounds of the Law:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-104—Communicating with One of Adverse Interest:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be

represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

No. 84-1654

(2)

Office - Supreme Court, U.S.
FILED
JUN 22 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

RITA M. LAVELLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

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QUESTIONS PRESENTED

1. Whether petitioner, in her defense to a prosecution for perjury and making false statements, should have been permitted to cross-examine a lawyer for the government agency of which petitioner was an official about an alleged ethical violation by the lawyer.

2. Whether the district court abused its discretion under Fed. R. Evid. 404(b) in admitting evidence of uncharged acts of misconduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1654

RITA M. LAVELLE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 751 F.2d 1266.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-31a) was entered on January 18, 1985, and a petition for rehearing was denied on February 20, 1985 (Pet. App. 33a). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner formerly was the Assistant Administrator of the Environmental Protection Agency (EPA) in charge of its Office of Solid Waste and Emergency Response. She was convicted in the United States District Court for the District of Columbia, after a jury trial, on one count of making

a false statement to EPA, in violation of 18 U.S.C. 1001; one count of endeavoring to obstruct an inquiry by a congressional committee, in violation of 18 U.S.C. 1505; and two counts of perjury before congressional committees, in violation of 18 U.S.C. 1621.[1] She was sentenced to concurrent terms of one to three years' imprisonment on each count, with all but six months suspended in favor of five years' probation; she also was fined a total of $10,000 (Pet. App. 28a-29a). The court of appeals affirmed (Pet. App. 1a-26a).

1. a. As summarized in the opinion of the court of appeals (Pet. App. 2a-7a), the government's evidence at trial showed that, prior to assuming her position as EPA Assistant Administrator, petitioner was Director of Communications for the Aerojet Liquid Rocket Company, a division of the Aerojet-General Corporation (Tr. 420-421). During the confirmation process, petitioner wrote a memorandum to Robert Perry, General Counsel of EPA, in which she agreed not to participate in any EPA matter that specifically involved Aerojet-General or its subsidiaries (Tr. 332, 970-971; C.A. App. 1158). She orally confirmed that written commitment during her confirmation hearings on March 23, 1982 before the Senate Committee on Environment and Public Works (*ibid.*). Pet. App. 2a.

During a May 28, 1982 staff meeting at which petitioner was present, the participants discussed a matter involving a toxic waste disposal site located in California known as the "Stringfellow site." During the meeting, Edward Kurent, EPA Associate Counsel for Hazardous Waste, informed petitioner that Aerojet-General was included on the list of parties who were potentially responsible for cleaning up the site and that she should consider recusing herself from

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[1]Petitioner was acquitted by the jury on an additional perjury count (Pet. App. 7a).

further participation in the matter (Pet. App. 3a; Tr. 77-78, 92, 170-171, 180-190). In addition, a briefing paper shown to petitioner at that time contained a list of parties responsible for the toxic waste. A page of the list that she examined showed Aerojet-General as a responsible party (Tr. 78, 171-172). When petitioner inquired of her staff whether the information concerning Aerojet-General was correct, they responded that it was (Tr. 79, 153, 171). Following receipt of this information, petitioner did not recuse herself from further participation in the Stringfellow matter, as Kurent had suggested; she instead continued to participate in the meeting and conduct discussions with her staff about the Stringfellow site (Tr. 141-142, 152-153, 177, 190-192).

On May 31, 1982, petitioner telephoned John Andreason, General Counsel and Vice President of Aerojet-General. During the conversation, she warned him that Aerojet-General had been identified as a distributor of toxic waste, discussed the remedial actions that had been proposed by others and decided upon by EPA, and stated that, because of Aerojet-General's involvement, she would have to recuse herself from participation in the matter (Tr. 420-424). On June 1, 1982, petitioner attended a second staff meeting concerning the Stringfellow matter, at which she participated in discussions concerning the sending of notices to responsible parties (Tr. 26-28). On June 3 or 4, petitioner told her confidential assistant that Aerojet-General was a contributor at the Stringfellow site (Tr. 523-524). The following week, Deborah Dalton, a scientist on petitioner's staff, prepared a memorandum outlining the action she believed EPA's regional office should take with respect to the Stringfellow site. On June 14, petitioner instructed her staff to send an "eyes only" copy of the Dalton memorandum to the EPA regional administrator (Tr. 174-175, 221-223). Pet. App. 3a.

When Kurent learned that petitioner had communicated with the EPA regional administrator concerning the Stringfellow matter, he suggested to EPA's General Counsel, Robert Perry, that he (Kurent) draft a site-specific recusal statement and present it to petitioner for her signature (Tr. 194-195). After Perry agreed, members of Kurent's staff drafted the recusal statement, and petitioner signed it on June 18, 1982 (GX 34; C.A. App. 1159). Pet. App. 4a.

b. In the late summer of 1982, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce requested information from EPA relating to three hazardous waste sites, including the Stringfellow site (Tr. 281-282; C.A. App. 1194, 1197). In reviewing documents relevant to a subpoena issued by the Subcommittee, Michael Brown, EPA's Deputy General Counsel, discovered the Dalton memorandum and its transmittal to the regional adminstrator. Because the document suggested that petitioner had not fulfilled her March 23, 1982 promise to the Senate Committee not to participate in matters affecting Aerojet-General, Brown recommended to EPA General Counsel Robert Perry that the House Subcommittee should be apprised of the document. Pet. App. 4a.

After reviewing Brown's recommendation, Perry arranged for a meeting attended by EPA Administrator Ann Burford, EPA Chief of Staff John Daniel, Perry, and petitioner. When confronted with the apparent violation of her recusal promise, petitioner defended her actions by pointing out that the Dalton memorandum predated her June 18 site-specific recusal and maintaining that she had not learned of Aerojet-General's involvement at the Stringfellow site until just a few days prior to execution of the recusal (Tr. 349-350). Burford then directed that the Dalton memorandum be furnished to the Subcommittee and that petitioner prepare an affidavit explaining her involvement

with the Stringfellow site for transmittal to the Subcommittee with the memorandum (Tr. 350, 355). Pet. App. 4a.

On December 14, 1982, a copy of the Dalton memorandum was furnished to the House Subcommittee. Accompanying it was a "Statement of Certification," signed by petitioner. The Statement was initially drafted by Acting Deputy EPA General Counsel Gerald Yamada but was thereafter revised by petitioner based on her knowledge of relevant facts (Tr. 375-380, 403-404, 409, 412, 975, 978-979). The document stated (C.A. App. 1091 (emphasis in original); Pet. App. 5a):

> As part of a follow-up to the briefing, an enforcement briefing was scheduled on Thursday evening, June 17. At that time, for the *first* time, I was told that an Aerojet-General subsidiary was cited as one of the possible responsible parties. I immediately left the briefing and executed a recusal statement (dated June 18) which is attached.

The false statement and obstruction counts (Counts 1 and 2) are based upon this averment. Pet. App. 4a-5a.[2]

On February 23, 1983, petitioner testified under oath before the Senate Committee on Environment and Public Works (Tr. 255-257). During her testimony, she stated that she "found out Thursday night [June 17, 1982] for the first time that Aerojet was one of the many companies who had dumped at [the Stringfellow] site, and then I recused myself according to my commitment to this committee" (Pet. App. 6a (emphasis added)). On the following day, petitioner gave substantially the same testimony before the Subcommittee on Investigations and Oversight of the House Committee

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[2]At trial, petitioner testified that the statement was accurate, that she could have included in the statement whatever she wanted to, and that "no one made [her] say that" (Tr. 978-979).

on Public Works and Transportation (Tr. 267-270). Specifically, she testified that she "had no knowledge whatsoever that * * * one of Aerojet-General's subsidiaries, would be one of the 250 universe [potential disposers] until * * * Thursday evening * * * [June] 17th. Thursday evening, is when for the first time I saw the list of disposers . . . I left the meeting and my staff prepared a letter of recusal which I signed the next morning" (Pet. App. 6a-7a (brackets in original)). These false statements to the Senate and House Committees formed the basis of the perjury counts (Counts 3 and 4) on which petitioner was convicted.

2. a. At trial, EPA attorney Michael Brown testified as a government witness concerning his discovery in December 1982 of the Dalton memorandum, his discussion with Perry concerning the document, and a subsequent opportunity given petitioner "to express her views of what happened" (Tr. 300-304).[3] During cross-examination, counsel for petitioner elicited from Brown admissions that he had professional differences with petitioner, that the two "had * * * different view[s] of public service," and that he had lodged complaints about her on several occasions (Tr. 327-328). The following colloquy then took place (Tr. 340-342; Pet. App. 9a-10a):

> Q: [By Defense Counsel] Let's go back to your duties as ethics officer. Where did you attend law school?
>
> A: [By Mr. Brown] Saint Mary's University, University of Virginia and Georgetown University Law Center.
>
> Q: And I assume you studied the Code of Responsibility there did you not?

---

[3]Brown's direct testimony in its totality is contained in approximately 10 pages of the trial transcript (Tr. 295-305).

A: Yes.

Q: And you are aware of the Code of Professional Responsibility?

A: As a general code, I would hate to have to recite any particular specific section thereof.

Q: Well, as ethics officer assistant, you examined it from time to time, didn't you?

[By the Prosecutor]: Objection, your honor. Outside the scope and irrelevant.

The Court: Clearly outside the scope.

[By Defense Counsel]

Q: Are you familiar with—let me try this again, your honor.

The Court: As I said, it is clearly outside the scope of direct examination.

At which time the parties approached the bench:

[Defense Counsel]: Your honor, I just want to ask him about one specific provision of the code to see if he is aware of it.

The Court: Which Code?

[Defense Counsel]: The one in effect in the District of Columbia. He is a member of the bar here.

[Prosecutor]: Your honor, what counsel is doing is trying to put his case in through our witness. If he wants to call the witness, he is free to do it.

The Court: He certainly is. But you are talking about the Code of Professional Responsibility?

[Defense Counsel]: Yes.

The Court: It has absolutely nothing to do with this case, certainly not on cross-examination.

b. EPA Deputy Counsel Gerald Yamada also testified on the government's behalf. He testified that, after he drafted the Statement of Certification, petitioner added a paragraph to the document detailing the events of June 14, 1982, of which he had no knowledge (Tr. 376-378). On cross-examination, Yamada acknowledged that, after petitioner executed the statement, he telephoned Kurent and learned that there was an inconsistency between her averment in the document and Kurent's recollection as to when she first learned of Aerojet-General's involvement in the Stringfellow matter. Yamada further acknowledged that he did not then call the inconsistency to petitioner's attention or attempt to prevent EPA's sending of the Statement of Certification to the House Committee. Yamada explained that when he told Perry of the inconsistency, Perry said that petitioner was so sure of her facts that he would give her the benefit of the doubt. Tr. 406-410.

In addition, the government presented evidence at trial of two other occasions on which petitioner presented false testimony. The first involved an April 8, 1982 meeting between petitioner and two New York State waste management officials. The two testified that, during the meeting, petitioner angrily complained that her Senate confirmation had almost been held up because of a letter one of them had written to Senator Moynihan concerning the waste disposal problem at Love Canal. A video-taped segment of petitioner's testimony during the February 1983 Senate Committee hearings showed that she testified that she had never told the official that his letter held up her confirmation (C.A. App. 1152). Pet. App. 14a-15a.

The second incident of false testimony occurred when, during the House and Senate hearings in February 1983, petitioner testified that she had voluntarily turned over her 1982 appointment calendars to the Committees; that she had not been given access to her records for the purpose of

preparing her testimony; and that no one had delivered any documents from her office to her following her termination with the agency on February 4, 1983. Susan Baldyga, petitioner's former Special Assistant, and Henrietta Janiszewski, her former Confidential Assistant, testified that although petitioner had turned over to the congressional committees two appointment calendars, she retained a third calender that she had maintained for personal matters and official responsibilities, including "industry-type appointments" (Pet. App. 15a). In addition, Baldyga testified that, on the day after petitioner's employment with EPA was terminated, she (Baldyga) and Janiszewski removed certain documents from petitioner's office and, while petitioner watched, placed them in an automobile belonging to petitioner's director of public relations. She further testified that the documents were later observed in petitioner's apartment. Pet. App. 15a-16a.

3. a. On appeal, petitioner maintained, inter alia, that, by foreclosing cross-examination of Brown concerning possible ethical violations, the district court precluded her from arguing that EPA attorneys had a "grudge" against her and had attempted to "set her up" and that such actions by the attorneys might have been motivated by a desire to avoid prosecution or to obscure violations of professional ethics. The court of appeals rejected those contentions (Pet. App. 11a-13a). The court of appeals observed that defense counsel had not explained to the district court that his reason for asking Brown whether he was aware of the Code of Professional Responsibility was to establish bias (*id.* at 11a). The court also observed that petitioner's cover-up theory was logically inconsistent, because, if the EPA attorneys had truly engaged in unethical conduct, they would have wanted to exculpate petitioner and (thereby) themselves, and would not have testified that they knew petitioner's statement to have been false when it was

submitted to Congress (*id.* at 11a-12a). The court further observed that, in any event, the jury was exposed to the facts upon which her claim of bias was based (*id.* at 12a-13a).

b. The court of appeals also rejected petitioner's contention that the uncharged incidents of false testimony were erroneously admitted into evidence (Pet. App. 14a-26a). The court held that the evidence was relevant to establish petitioner's subjective intent (*id.* at 18a-19a) and that the district court did not err in finding that its probative value outweighed any prejudicial impact (*id.* at 20a-24a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court of petitioner's fact-bound claims is not warranted.

1. Petitioner first contends (Pet. 12-27) that the district court erred in not permitting cross-examination of EPA attorneys concerning possible ethical violations. In particular, petitioner argues that she had an attorney-client relationship with the EPA attorneys, that by virtue of that relationship they had an ethical obligation to alert her to inconsistencies between her account of events in the Statement of Certification and Kurent's recollection, and that she would have been able to show bias on the part of the lawyers by establishing that they knowingly breached this alleged ethical obligation. See Pet. 15-17, 25-26. There are numerous flaws in petitioner's contention that her conviction should be set aside on this ground.

a. Although petitioner frames her argument broadly in terms of her being denied the opportunity to cross-examine the EPA "attorneys," in fact Michael Brown was the only attorney petitioner attempted to cross-examine at trial concerning his familiarity with the Code of Professional Responsibility. See pages 6-7, *supra*. As the court of appeals

pointed out (Pet. App. 11a n.8), defense counsel did not attempt to cross-examine Kurent or Yamada regarding their familiarity with the Code of Professional Responsibility or possible ethical violations (see Tr. 197-210, 214-216, 381-411), even though counsel did elicit from Yamada an admission that he did not contact petitioner after he learned that Kurent's recollection was inconsistent with petitioner's account in the Statement of Certification (Tr. 408-410).[4]

b. Even as to Brown, petitioner failed to preserve for appeal her current contention that cross-examination by reference to the Code of Professional Responsibility was necessary to establish bias. " 'It is axiomatic that the trial court must be apprised of the purpose of any inquiry to which objection is made.' " *United States* v. *Edwards,* 696 F.2d 1277, 1281 (11th Cir.), cert. denied, 461 U.S. 909 (1983), quoting *United States* v. *Garcia,* 531 F.2d 1303, 1307 (5th Cir.), cert. denied, 429 U.S. 941 (1967). See, *e.g., United States* v. *Sampol,* 636 F.2d 621, 649-650 (D.C. Cir. 1980); *Cheek* v. *Bates,* 615 F.2d 559, 563 (1st Cir.), cert. denied, 446 U.S. 944 (1980). Consistent with this principle, Fed. R. Evid. 103(a)(2) limits reversible error to instances in which "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." As the court of appeals observed, " '[r]eversal for * * * denial of the right to show bias on cross-examination thus requires both an affirmative assertion of that right and a knowing decision by the judge to deny or limit it' " (Pet. App. 11a (brackets in original), quoting *Cheek* v. *Bates,* 615 F.2d at 563). In this case, however, as the court of appeals further observed (Pet. App. 11a), during the bench conference concerning the

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[4]Former EPA General Counsel Perry did not testify at trial (Pet. App. 11a n.8).

question referring to the Code of Professional Responsibility, counsel merely stated that he "just want[ed] to ask [Brown] about one specific provision of the Code to see if he is aware of it" (Tr. 340-342). He did not identify any purpose to try to establish by this line of inquiry the existence of possible bias on the part of Brown. The current claim that the inquiry was proper to establish bias therefore was waived, and it is not properly before this Court.

c. In any event, there is no basis for the contention that Brown or other EPA attorneys owed an ethical obligation to petitioner to call her attention to inconsistencies between Kurent's recollection and her own Statement of Certification. As petitioner conceded in district court (C.A. App. 306), the EPA attorneys had no personal attorney-client relationship with petitioner. They were attorneys for EPA, and their duties of loyalty and confidentiality ran to the agency, their client. Accordingly, EPA could waive the attorney-client evidentiary privilege as regards any communications between petitioner and EPA attorneys (see *CFTC* v. *Weintraub,* No. 84-261 (Apr. 26, 1985)), and the lawyers were required to act in conformity with their duties as attorneys for the agency, as they understood those duties to be, whether or not their actions were consistent with the personal interests of petitioner.

Moreover, at the time when, petitioner asserts, EPA attorneys should have advised her of the inconsistency between her recollection and that of Kurent, she already had signed and submitted to EPA the Statement of Certification, which contained false statements of material facts concerning when she first learned of Aerojet-General's involvement in the Stringfellow site. That false statement concerned matters within the jurisdiction of EPA, and its submission to EPA therefore violated 18 U.S.C. 1001. *United States* v. *Rodgers,* No. 83-620 (Apr. 30, 1984). Indeed, the false statements in the Statement of Certification formed

the basis of Count 1 of the indictment, which charged a violation of 18 U.S.C. 1001 (C.A. App. 12-13) and on which petitioner was convicted in this case (Pet. App. 5a & n.3). The EPA attorneys clearly owed petitioner no ethical duty in connection with her submission of a false statement to EPA. Cf. *Clark* v. *United States,* 289 U.S. 1, 15 (1933). To the contrary, as we have said, their duty of loyalty was to EPA, and the agency had an interest in learning of any evidence of wrongdoing by petitioner while serving in the agency. Cf. *CFTC* v. *Weintraub,* slip op. 9-10. EPA General Counsel Perry chose to give petitioner the benefit of the doubt at the time she submitted the Statement of Certification, by transmitting the Statement to the congressional committee notwithstanding Kurent's contrary recollection. Petitioner can claim no immunity from criminal prosecution for her own false representations in that Statement (much less the perjurious testimony she subsequently gave before the congressional committees) by second-guessing Perry's decision to send the Statement to the House Committee.

d. Finally, there was abundant evidence before the jury from which petitioner could argue impropriety by EPA attorneys in the preparation and submission to Congress of the Statement of Certification and bias against petitioner. Deputy General Counsel Yamada admitted on cross-examination that, after petitioner revised and signed the Statement, he as well as EPA attorneys Perry and Kurent knew that it contained an inconsistency as to when she first learned of the Stringfellow matter, but that none of them apprised her of the error or afforded her the opportunity to correct it before it was transmitted to Congress (Tr. 407-411). And Brown, the EPA attorney to whom the cross-examination at issue was directed, acknowledged that he had professional differences with petitioner regarding the manner in which she performed her duties and that he had complained to superiors about her conduct. See page 6,

supra. As the court below observed (Pet. App. 12a), the jury therefore was fully exposed to the underlying facts upon which her arguments of bias and being "duped" by EPA attorneys were based.[5] Accordingly, cross-examination by reference to the Code of Professional Responsibility to illuminate petitioner's strained theory of an ethical violation would have added little.

2. Petitioner also argues (Pet. 27-30) that the district court improperly admitted under Fed. R. Evid. 404(b)[6] evidence that, during hearings before the congressional committees on February 22 and 24, 1983, she gave false testimony regarding whether she had accused a New York environmental official of delaying her confirmation and whether she had voluntarily surrendered all her 1982 appointment calendars and other office documents following termination of her employment. See pages 8-9, *supra*. Petitioner maintains that those events "were totally unrelated" to her actions in connection with the false Statement of Certification she executed on December 12, 1982, and "had no relevance to her intent to deceive when she

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[5]It is difficult in any event to understand the relevance to petitioner's defense of lack of intent of the EPA attorneys' alleged breach of an ethical obligation to correct factual inaccuracies in the Statement or to bring them to her attention. Petitioner acknowledged on cross-examination that no one forced her to make or sign the Statement of Certification, and, as the court below noted, the statutes under which petitioner was convicted "do[] not require that the defendant knowingly deceive *despite* adequate legal counsel." Pet. App. 13a n.10 (emphasis in the original).

[6]Fed. R. Evid. 404(b) provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

signed the Statement" (Pet. 28). This argument is without merit.

In the first place, petitioner's claim that these events were unrelated and have no relevance to one another is simply incorrect. As petitioner concedes (Pet. 30), the perjury counts relating to her false testimony before congressional committees "involved [petitioner's] intent to deceive Congress on the same facts which were contained in the Statement of Certification" executed two months earlier. The testimony resulting in those perjury convictions occurred on the same days as the acts of uncharged false testimony of which petitioner now complains. As the court below explained, evidence of these uncharged acts of perjury "was offered to establish a critical and seriously contested issue in the trial—[petitioner's] specific intent to deceive"—and to rebut her claim that her false statements concerning the sequence of events in the Aerojet-General matter were merely "innocent mistakes" (Pet. App. 21a-22a). If such evidence was probative of her intent to deceive during the February 1983 hearings—which petitioner does not dispute —it also was relevant to her intent in making identical statements in a written document transmitted to Congress little more than two months earlier. As the court of appeals observed, "both involved misrepresentations concerning the propriety of her conduct as the Assistant Administrator of the EPA" (Pet. App. 21a).

Moreover, the fact that the uncharged acts of misconduct occurred after the execution of the Statement of Certification does not affect their admissibility as to the counts that were based on that Statement. Evidence of subsequent similar acts of misconduct is fully admissible to prove guilty knowledge or intent on an earlier occasion, if they were not too remote in time. That is especially so where, as here, the events are interrelated. See, *e.g.*, *United States* v. *Gallo*, 543 F.2d 361, 365 (D.C. Cir. 1976) (uncharged offense

which occurred two months after charged offense); *United States* v. *Moschiano*, 695 F.2d 236, 243-244 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983) (three months); *United States* v. *Fischel*, 693 F.2d 800, 802-803 (8th Cir. 1982) (two months).[7] The court of appeals therefore did not err in this case in admitting into evidence the similar acts of false statements by petitioner to Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]In *United States* v. *James*, 555 F.2d 992, 1000-1001 (D.C. Cir. 1977), the only decision cited by petitioner, the court found in the particular circumstances presented that the probative value of the subsequent criminal act was "so weak" that, especially in light of the "sordid incidentals" of that act, the probative value was outweighed by the prejudicial impact of the evidence. Moreover, the court of appeals in this case cited its own prior decision in *James* (see Pet. App. 17a & n.11) and obviously did not see any conflict between the two.